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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 590

CLARENCE H. HICKOK, RUTH HICKOK MARVIN, E. W. MARVIN and DAISY S. HICKOK,
Petitioners,

vs.

TOLEDO SOCIETY FOR CRIPPLED CHILDREN, Toledo, Ohio; RIVERSIDE HOSPITAL, Toledo, Ohio; MERCY HOSPITAL, Toledo, Ohio; *Et Al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND SUPPORTING BRIEF.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND SUPPORTING BRIEF.

Clarence H. Hickok, Ruth Hickok Marvin, E. W. Marvin and Daisy S. Hickok hereby petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Texas, entered in this cause on November 18, 1953.

Opinions Below.

The opinion of the District Court is not reported; a copy thereof is attached hereto as Exhibit A. The opinion of the Court of Civil Appeals is reported at 252 S. W. 2d 739; a copy thereof is attached hereto as Exhibit B. The opinion of the Supreme Court of Texas is reported at 261 S. W. 2d 692; a copy thereof is attached hereto as Exhibit C.

Jurisdiction.

The jurisdiction of this Court has been invoked under 62 Stat. 929, 28 U. S. C. 1257. The judgment sought to be reviewed is a final judgment of the Supreme Court of Texas, the highest court of the State of Texas in which a decision in this case could be had. These petitioners specially set up and claimed, under Article IV, Section 1, of the Constitution of the United States of America, that a judgment of the Court of Appeals for the 6th District of the State of Ohio, affirmed by the Supreme Court of Ohio, was entitled to full faith and credit in these proceedings. This claim was denied by the Supreme Court of Texas.

The federal question sought to be reviewed was raised in the District Court of Eastland County, Texas, 91st Judicial District, the court of the first instance, by the following pleadings filed by these petitioners:

1. Motion for Summary Judgment. (R. 35)
2. First Amended Plea in Abatement. (R. 15)
3. Reply to Plaintiffs' Motion for Summary Judgment. (R. 29)
4. First Amended Original Answer. (R. 20)

The judgment of the District Court (R. 96) was in part adverse to the claims of these petitioners. Neither it nor the opinion of that court (Exhibit A) referred to the federal question.

The case was appealed to the Court of Civil Appeals for the 11th Supreme Judicial District of Texas. Petitioners there urged the federal questions by briefs, no pleadings by them being required. The judgment of the Court of Civil Appeals (R. 116) was entirely favor-

able to these petitioners, but was rendered on other than the federal question. Neither the judgment nor the opinion of the court (R. 109) referred to the federal question.

The respondents appealed to the Supreme Court of Texas. The petitioners there urged the federal questions in their briefs. Upon the announcement by the Supreme Court of Texas of its opinion, these petitioners filed in the said court their "Motion for Rehearing" (R. 136) in which they asked the court to set aside the opinion for the reason, among others, of "the error of this Court in failing to give to the judgment of the Supreme Court of Ohio full faith and credit as required by Article IV, Section 1, of the Constitution of the United States"; the petitioners further urged in their Motion for Rehearing that, "The Ohio courts having jurisdiction of this controversy and all parties having been before said Court and the same matter being involved, their judgment was conclusive and there can be no reason why this Court should not have given said judgment full faith and credit, and this Court erred in failing to so do" (R. 136).

The said Motion for Rehearing was denied (R. 138) and the judgment adverse to the claims of these petitioners was entered by the Supreme Court of Texas. The opinion of the Supreme Court of Texas says:

> "As a consequence of the basic rules above mentioned the courts of a state, which is not the situs of the land involved in a questioned devise or a devise in trust, are, generally speaking, without right to apply a law different from that of the situs, and their judgments assuming such a right are not protected by the 'full faith and credit' clause of the federal constitution * * *. Accordingly, the question presented to us cannot be considered as already

finally determined by the Ohio courts even if the words of the latter might indicate that such was their own understanding of their decree'' (R. 123-124).

The judgment of the Supreme Court of Texas is directly contrary to that rendered by the Court of Appeals of Ohio, as affirmed by the Supreme Court of Ohio (*Kirkbride* v. *Hickok,* 155 O. S. 293).

Question Presented.

An Ohio court having given judgment

a. as to rights in shares of stock of an Ohio corporation held by Ohio executors of an Ohio decedent who had received the shares partly in exchange for Texas real estate,

b. in an action in which the executors and all persons claiming rights in the shares were before the Ohio court as parties,

can a Texas court, in an action between the same parties, render a contrary judgment as to rights in the shares on the ground that the Ohio court had misconceived the law of Texas?

Statement of the Case.

A. S. Hickok, a resident of Ohio, died June 30, 1945, leaving surviving him a son, Clarence H. Hickok, a daughter, Ruth Hickok Marvin, and a widow, Daisy S. Hickok (who, joined *pro forma* by E. W. Marvin, husband of Ruth Hickok Marvin, are the petitioners here) (R. 46). At the time of his death, A. S. Hickok was one of two equal partners in the partnership of Hickok & Reynolds, which owned, among other things, interests in

Texas real estate (R. 6). Hickok was also the owner of other Texas real estate, rights in which were adjudicated by the courts below (R. 99).

His will, made on February 10, 1945, gave his residuary estate, which included his interests in the partnership of Hickok & Reynolds, to trustees. During a period of twenty years, the trustees were directed (by provisions of the will not in question here) to pay the income to the decedent's widow, his descendants, or the employees of corporations with which he had been associated. The trustees were given the broadest powers of sale, investment, and reinvestment. At the end of 20 years they were directed to divide the assets then in their hands into five funds and to distribute these funds between 20 charities, 19 of whom are the respondents here (R. 69-80).

Item XIV of the will recited the existence of the partnership agreement between the testator and one Harry Reynolds and that the partnership agreement provided for the incorporation of Hickok & Reynolds, Inc., an Ohio corporation, and for the transfer to that corporation of all assets of the partnership on the death of either of the partners, in exchange for which the surviving partner and the personal representatives of the deceased partner were each to receive one-half of the shares of the corporation. The testator expressly directed his executors to carry out that contract and to convey the decedent's interest in the partnership of Hickok & Reynolds in return for one-half of the stock of Hickok & Reynolds, Inc. (R. 80-81). Hickok & Reynolds, Inc., had in fact, been organized before the decedent's death (R. 6). In compliance with the provisions of the will, the executors on August 17, 1945, joined with Harry Reynolds to transfer all assets of the partnership to Hickok & Reynolds, Inc.; the executors

received in exchange shares of Hickok & Reynolds, Inc., so that, after the exchange, they held one-half the shares of that corporation (R. 7, 92).

On August 27, 1946, the executors brought an action in the Probate Court of Lucas County, Ohio, for the construction of the decedent's will, making parties all persons, classes of persons and institutions named therein (R. 38-40). The trustees named in the will filed an answer and cross-petition asking for instructions as to their duties (R. 39). All the charities appeared (R. 39); the 19 charities who are respondents here vigorously asserted their rights in the action. The Probate Court held that the gifts to the charities were invalid under the Ohio General Code Section 10504-5 (now Revised Code Section 2107.06), which provides:

> "If a testator dies leaving issue of his body, or an adopted child, living, or the lineal descendants of either, and the will of such testator gives, devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, religious, educational or charitable purpose, or to this state or to any other state or county, or to a county, city, village or other corporation, or association in this or any other state or country, or to a person in trust for such purposes, or municipalities, corporations or associations, whether such trust appears on the face of the instrument making such gift, devise or bequest or not; such will as to such gift, devise or bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator."

The judgment of the Probate Court, entered on August 11, 1948, provided, among other things, that: "The five funds • • • and the provision for the distribution of said funds • • • are invalid and of no effect by reason of

Section 10504-5, General Code"; that the defendant charities "have and shall have no right or interest in the assets of the trust created by the will of Arthur S. Hickok or any right at any time to share in any distribution thereof"; and that the defendant charities "are and shall be forever barred from asserting any right, title or interest in or to the assets of said estate and of said trusts or in or to any distribution thereof" (R. 40-41). An appeal was taken by the charities to the Court of Appeals for Lucas County, Ohio, which, on October 14, 1948, entered the same judgment as that entered by the Probate Court (R. 46). A further appeal was taken by the charities to the Supreme Court of Ohio, which affirmed the judgment of the Court of Appeals. See *Kirkbride* v. *Hickok*, 155 O. S. 293 (R. 61, 62).

The Ohio judgments contained no provision excluding from their effect the shares of Hickok & Reynolds, Inc., all of which were in the hands of the executors before they brought the action.

The present action in which petitioners are seeking certiorari was brought on January 7, 1948, by the respondents, 19 of the 20 charities named in the will of the decedent, against the executors, trustees, Daisy S. Hickok, Clarence H. Hickok, Ruth Hickok Marvin, joined *pro forma* by her husband E. W. Marvin, and Hickok & Reynolds, Inc., in the 91st District Court for Eastland County, Texas. In their petition, the charities alleged that they were bequeathed a remainder interest in the real estate owned by the partnership of Hickok & Reynolds. They asked that they be decreed to have such remainder interest, that Hickok & Reynolds, Inc., be decreed to hold title to the real estate as trustees for the charities, for an accounting for the proceeds of sales of oil and gas removed from said real

estate, and for other equitable relief (R. 1-15). The defendants severally filed pleas of abatement and to the jurisdiction, in which they alleged that the matters pleaded were already under consideration by the Probate Court of Lucas County, Ohio (R. 15-19). In accordance with Texas practice, decision as to these pleas was reserved and the defendants, without prejudice as to these matters, thereafter filed answers. After the decision by the Ohio courts, the judgments entered in Ohio were specifically pleaded (R. 36-37).

At the trial before the District Court, the charities stipulated that they made no objection to the conveyance by the representatives of the decedent's estate of his interest in real estate of the partnership to Hickok & Reynolds, Inc., and further stipulated that Hickok & Reynolds, Inc., acquired title to the lands and interests in land in Texas free of all claims by the charities (R. 92).

The judgment of the District Court was that the proceeds of the transfer of real estate (that is, the shares of Hickok & Reynolds, Inc.) "became personal property of the said estate subject to the exclusive jurisdiction and control of the courts of Ohio and the executors and trustees under the decedent's will" (R. 98).

Upon appeal to the Court of Civil Appeals for the 11th Supreme Judicial District of Texas, that court affirmed "the judgment of the Trial Court in so far as it decreed that the charities had no vested interest in the real estate belonging to the partnership of Hickok & Reynolds" (R. 116).

The Supreme Court of Texas, however, entered judgment that "the judgment of the District Court be so modified that as to the lands and mineral interests in lands situated in Texas being those lands that constituted part of the assets of the partnership of Hickok & Reynolds * * * the will of Arthur S. Hickok is valid and passed to the petitioners

herein the interests in trust which it purports to pass in accordance with the opinion of this Court" (R. 135). The opinion of the Supreme Court of Texas took the position that the charities would be entitled to any property which the executors and trustees, acting under their powers of management, might receive in exchange for the Texas real estate. Thus the court said: "The validity of the remainder as to Texas lands would simply mean that at the end of the period those lands or their equivalent would pass to the petitioners" (R. 123).

Presently, therefore, there is an Ohio judgment that the charities have no interest in shares of Hickok & Reynolds, Inc., and a Texas judgment rendered in litigation of the same issue between the same parties that the charities have an interest in these shares. The trustees, who have the duty to make distribution of the shares or their proceeds, were parties in both the actions in which the judgments were rendered; these petitioners, who were also parties, have been given by the Ohio judgment the interest in the shares which the Texas judgment attempts to give to the charities.

Reasons for Granting the Writ.

The petition should be granted so that this Court may clarify a point of constitutional law as to the extent to which a court of one state may refuse to give full faith and credit to a judgment of a court of a sister state, on the ground that the court of the sister state has no power to determine rights in local real estate *even though all parties were before the court of the sister state.*

The Court of Appeals of Ohio gave a judgment, affirmed by the Supreme Court of Ohio, that certain charities, respondents here, had no right or interest in property held by trustees and that the petitioners are entitled to distribu-

tion of the property; the Supreme Court of Texas later gave a judgment that the charities did have an interest in the property and are entitled to distribution of it. Only this Court can determine which judgment controls the rights of the parties. The Supreme Court of Texas said in its opinion herein:

> "If we decide for the petitioners [the respondents here], the only reason the Ohio courts might entertain to disregard our decision would be that we have disregarded rules of the Conflict of Laws, and the correctness of such a conclusion would, of course, be for final determination by the Federal Supreme Court, as evidenced by the Clark case" (R. 125).

The conflict between the two judgments, unless settled here, will cause lengthy future litigation in both Texas and Ohio. However, the real importance of the case lies in the fact that it calls for a decision as to the line of demarcation between the respective applications of two principles of law, each of importance and each supported by substantial considerations, but at times conflicting. On the one side is the principle that a judgment of a court of one state, with personal jurisdiction over parties, determines the rights of the parties, if these rights are afterwards called in question in litigation in another state. On the other side is the claim of the Supreme Court of Texas that only a court of Texas can determine rights arising out of Texas land. Because of the protection given by the Constitution of the United States to the judgments of the courts of the several states, only this Court can fix the dividing line between the application of the two principles.

The case for the application of the full faith and credit clause is a simple one. An Ohio court adjudicated rights in personal property in an action in which it had jurisdiction *in personam* over all persons claiming rights in the

personal property. Because the personal property had been received in exchange for Texas real estate, the Ohio court, under generally accepted principles of Conflict of Laws, may have been called upon to apply the law of Texas to determine what the rights of the parties had been in the Texas real estate. However, whether the Ohio court correctly applied the law of Texas, or disregarded it completely, cannot affect the power of the Ohio court to give a binding judgment. As a constitutional matter, a judgment of a court acting within its jurisdiction is entitled to full faith and credit without "any inquiry into the merits of the cause of action, the logic or inconsistency of the decision, or the validity of the legal principles upon which the judgment is based" (*Milliken* v. *Myer,* 311 U. S. 457, 462). A Texas court is required to give full faith and credit to an Ohio judgment even if the Ohio court, while acting within its jurisdiction, improperly applied the law of Texas (*Fauntleroy* v. *Lum,* 210 U. S. 230, 236-237; *Roche* v. *McDonald,* 275 U. S. 449, 454-455).

The petitioners do not find it possible to state the position of the Supreme Court of Texas as simply as the petitioners' position can be stated. The Supreme Court of Texas devoted the greater part of its opinion, not to the constitutional question, but to a consideration of the effect of the doctrine of equitable conversion. With its views on that doctrine, except as they relate to the Ohio judgment, we have no concern here. However, the petitioners do wish to call attention to its statement that the question of whether the law of Ohio or the law of Texas governs the disposition of a decedent's estate cannot depend on a fiction such as equitable conversion, but must depend on the reality of power over actual property. We are not here directly concerned with the correctness of this statement,

since it concerns, not the power of a court to give a judgment, but the choice of the law to be administered by the court. However, the petitioners do wish to point out that the jurisdiction of the Ohio court did not depend on the fiction of equitable conversion (although the law to be applied by the Ohio court may have so depended), but on the reality of the power of an Ohio court over shares of an Ohio corporation, held by a party before the Ohio court.

In considering whether it was required to give full faith and credit to the Ohio judgment, the Supreme Court of Texas assumed throughout its opinion that the Ohio judgment dealt with, and affected, rights in Texas real estate. It ignored the stipulation of the parties that the decedent's interest in Texas real estate had been properly transferred to Hickok & Reynolds, Inc., which now holds the real estate free from the claims of the charities. It ignored the fact that the only assets of the decedent's estate, so far as the present controversy is concerned, with which either it or the Ohio court could deal, were shares of an Ohio corporation.

However, even accepting the premise of the Supreme Court of Texas that it was adjudicating rights in Texas real estate, its decision still fails to give the required constitutional effect to the Ohio judgment. Its opinion points out that the validity of a bequest of Texas real estate must be determined by the law of Texas. With this statement, the petitioners are in accord. However, the petitioners believe that the Supreme Court of Texas erred in reasoning that, if courts of Ohio are obligated to apply the law of Texas to all questions of Texas real estate, judgments of an Ohio court, which do not correctly apply the law of Texas, need not be recognized by a Texas court. As to this, the Supreme Court of Texas said:

> "• • • courts of a state, which is not the situs of the land involved in a questioned devise, or devise in trust, are, generally speaking, without right to apply a law different from that of the situs, and their judgments assuming such a right are not protected by the 'full faith and credit' clause of the federal constitution."

The petitioners concede that a judgment of an Ohio court, refusing to give full faith and credit to Texas laws concerning Texas real estate, might be erroneous, as contrary to the Constitution of the United States, and might be reversed by this Court. However, even an erroneous judgment of an Ohio court, unless so reversed, must be given full faith and credit by a court of Texas (*Milliken* v. *Myer,* 311 U. S. 457, 462; *Fauntleroy* v. *Lum,* 210 U. S. 230, 236-237; *Roche* v. *McDonald,* 275 U. S. 449, 454-455, *supra*).

Elsewhere in its opinion, the Supreme Court of Texas rests the exclusive jurisdiction of Texas courts to determine all questions as to title to Texas real estate on the basis that only the State of Texas has actual physical power over such real estate. The petitioners concede that an Ohio court cannot direct its officers or any officers of the State of Ohio to take action in Texas and that officers of the State of Texas need not obey the order of an Ohio court. However, the fact that an Ohio court cannot, by its own officers, execute its decrees in Texas certainly does not mean that a Texas court is not under any obligation to recognize an Ohio judgment. A judgment for money given by an Ohio court cannot be levied on Texas real estate, but must, nonetheless, be given full faith and credit in an action in Texas.

Although the reasons given by the Supreme Court of Texas for refusing to recognize an Ohio judgment con-

cerning rights in Texas real estate are not sufficient, petitioners believe that this Court should now determine, what has not been determined in the past, the extent to which the federal constitution protects judgments of the courts of one state determining rights in real estate located in another state.

The ruling of this Court, which the petitioners seek, is supported by two firmly established principles. The first principle is that a court of equity in one state may enforce a trust or other equitable rights in land situated in another state (*Burnley* v. *Stevenson*, 24 O. S. 474, 478; *Massie* v. *Watts*, 6 Cranch 148, 160; *Pomeroy's Equity Jurisprudence*, (5th Ed.) Vol. 4, pages 898-899; *Banco Minero* v. *Ross & Masterson*, 138 S. W. 224, 236 (Tex. Civ. App. 1911, affirmed, 106 Tex. 522, 172 S. W. 711); *Milner* v. *Schaefer*, 211 S. W. (2d) 600, 605 (Tex. Civ. App., Writ of Error refused)). The second principle is that the judgments of the courts of one state must be given the same faith in another state as they have by law in the courts of the state rendering them (*Morris* v. *Jones*, 329 U. S. 545, 547; *Chicago & Alton Railroad* v. *Wiggins Ferry Co.*, 119 U. S. 615, 622). These two principles taken together would certainly lead to the conclusion that the judgment of an Ohio court, acting within its power under Ohio law to determine rights in a trust of real estate, is entitled to full faith and credit in Texas.

While the principles stated above are clear enough, petitioners urge that this Court should more clearly define the legal situation than it has in the past. This Court has announced two rules, not inconsistent with each other, in respect to the judgments of courts of one state relating to real estate located in another state. The first rule is that a court of a state other than that of the situs of real estate

has no power to affect, directly or *in rem*, title to the real estate. Thus, a master's deed given pursuant to such a judgment is ineffective (*Fall* v. *Eastin*, 215 U. S. 1, 11). No lien is created by such a judgment on the real estate (*Carpenter* v. *Strange*, 141 U. S. 87, 106). With this rule we are not here concerned. Second, where all persons interested in real estate are personally before a court of a state other than that of the situs, the decree of the court is conclusive upon the parties and, thus, in effect, although not directly, determines title to real estate. *Dull* v. *Blackman*, 169 U. S. 243, 247, and *Fall* v. *Eastin*, 215 U. S. 1, 11, state the second rule clearly. However, it must be admitted that the statements are *dicta* rather than holdings, and that this Court, while announcing the second rule much in the language used above, has not clearly shown the extent to which a personal judgment as to rights in land concludes the parties to the judgment.

The need for clarification of the law is indicated by the treatment by the Supreme Court of Texas of the case of *Clarke* v. *Clarke*, 178 U. S. 186. The Texas Supreme Court cites this case for the proposition that, if a court proceeding on the theory of equitable conversion determines rights in foreign real estate on the basis of its own law, a court of the situs need not recognize the judgment. We submit that this is a misconstruction of *Clarke* v. *Clarke*. In that case a court of South Carolina had entered a judgment that Connecticut real estate, the property of a deceased resident of South Carolina, should pass under the laws of inheritance of South Carolina to the decedent's surviving spouse. The decedent's daughter, represented in the South Carolina proceedings by a guardian *ad litem*, would have been entitled to real estate under the laws of Connecticut. The South Carolina court, in reaching its decision, reasoned that the Connecticut real estate had been equitably con-

verted into personal property. A Connecticut court, in an action in which the minor was represented by a Connecticut guardian *ad litem,* refused to follow the South Carolina judgment and awarded the property to the minor; the Connecticut judgment was affirmed by this Court. The opinion of this Court clearly points out that the Connecticut guardian *ad litem* was not bound by the judgment in South Carolina. The court said:

> "• • • Neither the executor or trustee under the will, or the guardian *ad litem,* or any other person assuming to represent the minor in South Carolina, had authority to act for her *quo ad* her interest in real estate beyond the jurisdiction of the South Carolina court, and which was situated in Connecticut (p. 193).
>
> • • • • • •
>
> "• • • It results that no person before the South Carolina court, assuming to speak for the estate of Nancy B. Clarke, represented any real property of said Nancy which was not within the territorial jurisdiction of South Carolina, and the decree, therefore, could not affect land in Connecticut, an interest which was not before the court" (pp. 194-195).

Accordingly, it is clear that in *Clarke* v. *Clarke,* this Court was not called upon to decide, and did not decide, that a Connecticut court would not have been bound by the judgment of a South Carolina court as to rights in Connecticut real estate, in an action *between the same parties* as those present in Connecticut.

The petitioners admit that *Clarke* v. *Clarke* has sometimes been said, even by recognized authorities, to hold that the exclusive jurisdiction of the courts of the situs over real estate deprives the judgments of courts of sister states

of any effect. Thus, Beale on *The Conflict of Laws* cites *Clarke* v. *Clarke* for the proposition that:

> "A court of equity is often asked to interpret a will or other instrument purporting to convey land in another state. Such interpretation, even between the parties to the suit, is not allowed by the state of situs to affect the title, but that state, in spite of the former decision and even between the parties to it, will put its own interpretation on the instrument. * * *" (p. 423).

The conflict between such an interpretation of *Clarke* v. *Clarke* and the statements of this Court in *Dull* v. *Blackman*, 169 U. S. 243, 247, and *Fall* v. *Eastin*, 215 U. S. 1, 11, *supra*, should be ended by a judgment in the present case by this Court.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: February , 1954.

Respectfully submitted,

/s/ Frank C. Harrington

/s/ Jamie Hedgepeth, Jr.

/s/ Henry W. Sawyer

Counsel for Petitioners

Exhibit A.

The 91st District Court of Eastland County, Texas

COURT'S OPINION:

In re: Toledo Society for Crippled Children, et al. vs. Walter G. Kirkbride, et al., 91st District Court, Eastland, Eastland County, Texas.

Before proceeding with an outline of my findings of the issues involved in this suit, may I express to the attorneys for both plaintiffs and defendants my profound appreciation for their co-operation throughout the court hearings, and for the able briefs furnished by each of them, which have been of great assistance to the Court in the study of this case.

Since the plaintiffs have dismissed from this case the defendants, Hickok & Reynolds, Inc., and R. L. Ponsler, it appears to me that there only remain to be determined by this court the following issues:

1. The jurisdiction of the Court to determine the issues involved in this litigation.
2. A determination of the jurisdiction of the Ohio Courts concerning the Hickok Estate.
3. The validity of Mr. Hickok's Will as it pertains to his Texas properties.
4. A determination of the controversial issue of the doctrine of equitable conversion and its application to some of the properties of the estate involved.
5. A determination of the issue as to the nature of the real estate in the name of Arthur S. Hickok, individually, other than the undivided interest in the real estate held by Mr. Hickok in the partnership of Hickok & Reynolds, and to determine what interest, if any, in said property was owned by the defendant, Daisy S. Hickok.

In view of the pleadings, the evidence offered and the stipulations of the parties, I am of the opinion that all of the issues now involved may be disposed of by the Court on the motions of both plaintiffs and defendants for summary judgment, and that no necessity exists for a trial of this case upon its merits.

I.

The Court is of the opinion and finds that it has jurisdiction to determine all questions now involved in this lawsuit.

II.

The Court is of the opinion and finds that the Ohio Courts did not attempt to exercise jurisdiction over real estate situated in Texas belonging to Arthur S. Hickok at the time of his death, and that this Court has exclusive jurisdiction concerning such real property.

III.

The Court is of the opinion and finds that the Hickok will in issue is valid in Texas in all of its provisions.

IV.

The Court is of the opinion and finds that by the terms of the Hickok Will and the partnership agreement of Hickok & Reynolds, which was made a part of said Will, that it was the purpose and intention of the testator, Arthur S. Hickok, to have all of his interest in the partnership property of Hickok & Reynolds immediately converted into personal property, and that by virtue of the provisions of the Will, there was at the time of the death of the testator, an equitable conversion of all of testator's interest in the partnership property of Hickok & Reynolds, and that the same became personal property of the said estate; and

that by reason thereof, the courts of Ohio and the Executors and Trustees of the Hickok Estate, have exclusive jurisdiction concerning the same; subject, of course, to all the terms and conditions of the Will.

V.

It is shown by the plaintiffs' pleadings and the stipulations of all the parties herein, that at the time of the death of Arthur S. Hickok that there was held in his name the lands and mineral interests described in paragraph 3, Subdivision 7, (insofar as an undivided one-fourth (¼) interest is concerned), and in paragraph 3, Subdivisions 8 and 9 of plaintiffs' Original Petition. In connection with this property, the Court is of the opinion from the stipulations of the parties and the evidence adduced that the said lands were acquired by Arthur S. Hickok and taken in his name during the time of his marriage to the defendant, Daisy S. Hickok, and that during all of said periods, the said Arthur S. Hickok, and his wife resided in the State of Ohio and that under the laws of both the State of Ohio and the State of Texas, the law presumes that property acquired under such conditions as was done in this case, that it was purchased with the separate funds of Arthur S. Hickok; and since said presumptions were not overcome by testimony, it necessarily follows that I must find that the real estate so acquired by Arthur S. Hickok, at the time of his death was his separate property, and that his wife, Daisy S. Hickok, at the time of his death, owned no interest, community or otherwise, in any of the said properties. And the Court further finds that all of said property being real estate, under the terms of the Will of the testator, passed to the plaintiffs at the time of his death and that the plaintiffs have a vested remainder in all of said property, subject to the terms and conditions of the Will.

If I should be in error in my findings that the above and foregoing are the only issues involved, and that others should be disposed of by the Court at this time, I would

appreciate being advised in order to dispose of any remaining ones so that final judgment may be entered.

I suggest that the attorneys representing the plaintiffs prepare and submit to the defendants' attorneys, judgment for approval as to form, and that when such form of judgment has been agreed to that the same be submitted to the Court for final approval and entry.

Assuming that each of the parties will desire to appeal from the judgment based upon my findings, I suggest that such notice be given in the judgment to be submitted, thus, avoiding the necessity of additional orders.

Respectfully submitted,

Judge 91st District Court,
Eastland County, Texas.

GLD:H

Exhibit B.

Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

TOLEDO SOCIETY FOR CRIPPLED CHILDREN, *et al*, Appellants, *vs.* CLARENCE H. HICKOK, *et al*, Appellees.	No. 2956

Appealed from the District Court of Eastland County, Texas.

Arthur S. Hickok, a resident of Toledo, Ohio, died on June 30, 1945, leaving his widow, Daisy S. Hickok, and two children, Ruth H. Marvin and Clarence H. Hickok. On February 10, 1945, Arthur S. Hickok executed a will and, after minor bequests, gave the residue of his estate, which included his interest in the partnership of Hickok & Reynolds and his Texas real estate, to trustees to be held in trust for a period of twenty years, the income therefrom during the period to be paid to his widow, his son, his daughter and certain employees of corporations in which he was interested. The provision for income to be paid his widow is not material for the reason that she elected not to take under the will and, under the laws of Ohio, received one-third of her husband's estate. Under the terms of the will, the trustees were given full powers to sell, and otherwise manage, the assets of the estate. At the end of twenty years the trustees were directed to divide the assets remaining in their hands into five funds and to distribute these funds to twenty charities, all of which are parties to this suit.

The testator instructed the executors to convey his interest in the partnership of Hickok & Reynolds to Hickok & Reynolds, Incorporated, in exchange for shares of stock in the corporation in accordance with an agreement between Hickok and his partner, J. H. Reynolds, theretofore entered into. After the death of the testator, his executors, acting under the directions in the will and carrying out the agreement the testator had with his partner, conveyed all the testator's interest in the partnership of Hickok and Reynolds to Hickok and Reynolds, Inc., in exchange for stock therein.

In an action in the probate court of Lucas County, Ohio, for construction of the will, the question of the rights of the charities was raised and after a hearing, the court held that the provision of the will devising to the charities the estate remaining at the end of twenty years was invalid and of no effect by reason of Section 10504-5, General Code of the State of Ohio, said section being as follows:

> "If a testator dies leaving issue of his body, or an adopted child, living, or the lineal descendants of either and the will of such testator gives, devises, or bequeaths the estate of such testator, or any part thereof, to a benevolent, religious, educational or charitable purpose, or to this state or to any state or country, or to a county, city, village or other corporation, or association in this or any other state or country, or to a person in trust for such purposes, or municipalities, corporations or associations, whether such trust appears on the face of the instrument making such gift, devise or bequest or not; such will as to such gift, devise or bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator."

Arthur S. Hickok died within one year after the execution of his will. The probate court held that by reason of the above law the charities had no right or interest in the assets of his estate. The charities appealed, and the

Supreme Court of Ohio affirmed this judgment in *Kirkbride* vs. *Hickok*, 155 O. S. 293, 98 N. E. (2d) 815.

The charities thereafter instituted this suit in the District Court of Eastland County, alleging that the will of Arthur S. Hickok gave them a vested remainder in his real estate located in Texas, including that of the partnership of Hickok & Reynolds, and that the conveyance by the executors of decedent's interest in the partnership resulted in the taking by Hickok & Reynolds, Inc., of the property in trust for the charities. They also sought a construction of the will and to establish their remainder interest in decedent's real estate in Texas and to quiet title thereto. The suit for an accounting was severed and not determined herein. The trial court sustained motions for summary judgment and held that there was an absence of any genuine issue of fact. The court found that the partnership agreement of Hickok and Reynolds and the will effected an equitable conversion of all decedent's interest in the partnership assets into personal property and, therefore, subject to the exclusive jurisdiction of the courts of Ohio. It further adjudged that the charities take no part of the partnership property or of the shares of Hickok & Reynolds, Inc. The court found that the charities had a vested remainder in three described parcels of Texas real estate owned by Arthur S. Hickok individually, subject to the rights of the trustees during twenty years after decedent's death and that Mrs. Hickok had no community interest therein. From this judgment the charities and the Hickoks have appealed.

It is the contention of the Hickoks that the trial court erred in holding that the will of Arthur S. Hickok gave the charities a vested remainder in the real estate situated in Texas owned individually by Hickok. We believe this contention must be sustained.

> "A remainder is vested where there is a person in being who would have an immediate right to the possession upon the termination of the intermediate estate. It is an immediate right of present enjoyment, or a present right of future enjoyment, a fixed

interest, with only the right of possession postponed until the ending of a particular estate." Caples *vs.* Ward, 179 SW 856 (Sup. Ct.).

Under the will of Arthur S. Hickok, the trustees had the absolute control and management of all of the estate for a period of twenty years after the death of testator. At the expiration of twenty years, the trustees were directed to divide the residue of the estate into five funds. The will provided that Fund No. 1 should amount to forty percent thereof; Fund No. 2 should amount to twenty-five percent thereof; Fund No. 3 should amount to twenty percent thereof; Fund No. 4 should amount to ten percent thereof and Fund No. 5 should amount to five percent thereof. The trustees were directed to distribute Fund No. 1 to the Toledo Society for Crippled Children and three other charitable institutions, share and share alike. Fund No. 2 was to be distributed to the Toledo Chapter American Red Cross and three other charitable institutions, share and share alike. Fund No. 3 was to be distributed to Little Sisters of the Poor and three other charitable institutions, share and share alike. Fund No. 4 was directed to be distributed to Arthur S. Hickok Memorial Hospital, Geneva, Ohio, and three other charitable institutions, share and share alike, and Fund No. 5 was to be distributed to Old Folk's Home of Toledo, Ohio, and three other charitable institutions, share and share alike. The will of Arthur S. Hickok contained the following provision:

> "The term 'charitable institution' shall include churches, schools and school boards, funds, chests, as well as any other institution reorganized as a charitable institution under the Federal estate or other tax laws. No institution, however, although it is named herein, shall share in said funds, if the same has been dissolved, wound up or discontinued, nor unless at the time of distribution it is authorized to accept and take a devise, bequest or gifts under this will without creating liability upon my executors or trustees for any estate or inheritance tax. Should

any named institution be not authorized to accept or take any such devise, bequest, or gift under this will without creating any such tax liability but a board, or trustees of such institution may so accept and take, without creating any such liability, the said board or trustee shall be the beneficiary hereunder."

We have concluded that these charities had no vested remainder in any of the real estate located in Texas. The test of a vested remainder requires the existence of a certain person or organization having a present right of future enjoyment of a fixed interest, with only the right of possession postponed until the end of a particular estate. Where the person who is to take the property can be definitely determined and no limitation or condition is imposed upon his right of possession, except the expiration of the intervening estate, then a vested interest in the remainder exists. *Medlin* vs. *Medlin,* 203 SW (2d) 635; *Caples* vs. *Ward,* 179 SW 856, 107 Tex. 341; *Mitchell* vs. *Edds,* 181 SW (2d) 323, 143 Tex. 307; *Edds* vs. *Mitchell,* 184 SW (2d) 823; 158 A. L. R. 470.

Under the terms of the will, the charities had no interest in any specific portion of the estate. There is no way of determining which of the charities would be entitled to the possession of the real estate located in Texas upon termination of a prior estate. The trustees were given the right to divide the estate in kind. They had the power under the will to sell any or all of the real estate or other property belonging to the estate and to divide the assets remaining at the end of twenty years into five funds and then to distribute these funds to the various charities. In other words, it was within the discretion of the trustees as to what particular property of the estate would be placed in any particular fund. Therefore, it will readily be seen that at this time it cannot be determined which of the parties would be entitled to possession of the Texas real estate at the end of twenty years. We believe that under the terms of the will, the rights of the charities in the Texas land is contingent and not vested. The rule seems to be that when there is a person in being who would have immediate right

to the possession of the lands, should the intervening estate terminate, such person has a vested remainder, but, if something more than the duration of the intervening estate should come between the remainderman and the right to immediate possession, that is to say, if there is some unperformed or unfulfilled contingencies, which would prevent his taking possession were the intervening estate to terminate, that the remainder is contingent. Under the will the charities have no right to immediate possession of the land at the end of the intervening estate. They might not get land or its proceeds. There is something to be performed before any of the charities can ever obtain possession of the land, that is, such land would have to be placed in the fund by the trustees and set aside to such charity.

The charities among which distribution was to be made were to be determined at the end of twenty years after the death of testator. An institution to take under the will must not have been dissolved, wound up or discontinued and must meet the requirements of the will with reference to taxes. It is our construction of the will that it was not the intention of the testator to vest in the charities a present interest in the estate. There is a clause in the will to the effect that if any person, heir, devisee, legatee or beneficiary named therein shall by procedure in court or otherwise make any effort or attempt to break, change or set aside the will or any part thereof, such person or persons shall be barred from any right, title or interest to any devise, bequest or gift thereunder. There is the further provision that any bequest under the will or under the trust created shall not be subject to pledge, assignment, sale or transfer nor shall any person have power in any manner to alienate, dispose of, assign, charge or encumber his interest, either income or principal therein. It is further provided that if any person should attempt to sell or otherwise dispose of his interest in the estate that his interest therein shall cease and terminate. When these provisions are construed in connection with the other portions of the will heretofore discussed, it is plain to our mind that the testator did not intend to vest in the charities a present interest in the remainder. The provisions in the will made

their interest therein contingent and not vested. *Glenn* vs. *Gross*, 294 NW 297; 31 C. J. S. 88; *Hunt* vs. *Carroll*, 157 SW (2d) 429; *Thornton* vs. *Zea*, 55 SW 798 (Writ Ref.); Page on Wills, Second Edition, Vol. 2, Section 1118, 1119; *in re: Handy's Estate*, 37 Atl. 854; 3 Tex. Jur. 877; Black's Law Dictionary, page 1456, 1457.

What has been said applies with equal force to the real estate and assets of the partnership of Hickok & Reynolds. Although placed upon a different theory, the trial court correctly held that the charities had no vested remainder in any of said property. The trial court was in error in holding that the charities had a vested remainder in the real estate situated in Texas owned individually by Arthur S. Hickok. The trial court correctly held that Mrs. Hickok had no community interest in the real estate located in Texas. Arthur S. Hickok and wife were residents of Ohio and never at any time resided in Texas. It was stipulated that the properties involved were acquired in the name of Mr. Hickok. It was further stipulated that the community property law has never existed in the State of Ohio. Under the facts the real estate purchased in Texas by Mr. Hickok was his separate property. *Oliver* vs. *Robertson*, 41 Tex. 422; *Duke* vs. *Reed*, 64 Tex. 705; *Grange* vs. *Kayser*, 80 SW (2d) 1007; *Tasher* vs. *Foster Lumber Co.*, 205 SW (2d) 665; *Thayer* vs. *Clark*, 77 SW 1051, affirmed 98 Tex. 142, 81 SW 1274; 23 Tex. Jur. 96, Sec. 73.

The judgment of the trial court insofar as it decreed that the charities had no vested interest in the real estate belonging to the partnership of Hickok & Reynolds and that Mrs. Hickok had no community interest in any of the real estate situated in Texas is affirmed. That portion of the judgment decreeing that the charities had a vested remainder in the individually owned property of Arthur S. Hickok is reversed and judgment is here rendered that the charities have no vested remainder therein.

The judgment of the trial court is affirmed in part and reversed and rendered in part.

MILBURN S. LONG,
Associate Justice.

October 24, 1952.

Exhibit C.

No. A-3938.

IN THE

SUPREME COURT OF TEXAS.

TOLEDO SOCIETY FOR CRIPPLED CHILDREN *et al.*, Petitioners, *v.* CLARENCE H. HICKOK *et al.*, Respondents.	From Eastland County, Eleventh District.

Our petitioners—sundry charitable, religious and similar enterprises, including the Toledo Society for Crippled Children—seek in this suit against the respondents, who are the two children, widow, executors and trustees of the late Arthur S. Hickok, an Ohio resident, to establish their rights specified in Mr. Hickok's will, but only to the extent of certain lands, and mineral estates in land, located in Texas. All of the parties to the suit appear to reside in Ohio or have their corporate offices there. The facts are without substantial dispute. The sole obstacle to the enjoyment by the petitioners of the benefits conferred by the will is that the latter was executed less than a year before the testator died leaving issue surviving. Under such circumstances, an Ohio statute (which has no counterpart in our law) declares testamentary gifts to enterprises such as the petitioners to be invalid. See Footnote 1. In previ-

Footnote 1. "If a testator dies leaving issue of his body, or an adopted child, living, or the lineal descendants of either, and the will of such testator gives, devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, religious, educational or charitable purpose * * * or to a person in trust for such purposes * * * such will as to such gift, devise or bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator." (General Code of Ohio, Sec. 10504-5.)

ous litigation between the same parties, the Ohio courts have in general terms adjudged the statute to be applicable. See *Kirkbride* v. *Hickok,* 155 Ohio St. 293, 98 N. E. 2nd 815. In the instant suit, the District Court of Eastland County, on motion for summary judgment, held the gifts valid in respect of part of the Texas property in question and invalid as to the rest. The Eastland Court of Civil Appeals reformed that judgment so as to deny the petitioners any relief whatever—stating that their interest was contingent rather than vested. 252 S. W. 2d 739. We granted writ of error upon rehearing of the petitioners therefor.

The will, in brief, after a few minor specific bequests of no materiality here, left the residue, consisting of both real and personal property in Ohio and elsewhere valued at several million dollars, as a trust, with provision to pay the income to certain individuals, principally the widow (who has elected to take her statutory portion rather than under the will) and children (who are both adults) for 20 years, then to divide the corpus into five so-called "funds", which are respectively defined merely as a certain "percent" of the total corpus on hand at that time, forthwith distributing each fund equally among the charitable or religious entities named as the respective beneficiaries thereof (our petitioners being included under one "fund" or another). The powers of the trustees, which the will specifies in careful detail, included a general one to sell property of the corpus (but without directions so to do) and express authority to retain (without risk of liability) the original corpus assets, real or personal, to invest and reinvest in both realty and personalty, and also the right to make final distribution in kind upon their own exclusive valuation of the property concerned. The Ohio judgment above mentioned in effect lifted out of the trust as invalid the provision for the remainder to the petitioners and substituted a provision that at the end of the twenty-year period the corpus should pass as intestate property. *Kirkbride* v. *Hickok, supra.*

The greater part of the estate consisted of *moveables,* which were personalty situated outside of Texas, and as

to it the propriety of applying the domiciliary law which ordinarily governs testamentary disposition of moveables wherever situated, is naturally not questioned in this suit. Restatement of the law, Conflicts, Sec. 306. The property, as to which the question *is* raised, may be said more particularly to consist of (a) a tract of Texas land and a few mineral interests in Texas land, owned by Mr. Hickok individually at his death and presently not of great value; (b) similar mineral interests of considerable value, which at the death of the testator were owned by a partnership called "Hickok & Reynolds", of which the testator and Harry Reynolds of Cisco, Texas, were the partners.

It is perhaps appropriate to observe at this point that, minerals in land or "in place" being, by our local law, land, we are admittedly well within our rights in characterizing the mineral estates here in question as Texas land for purposes of the Conflict of Laws as well as for purely domestic purposes. See Restatement, *supra*, Sec. 208.

As to the partnership property, certain additional and undisputed facts are said to be important. On January 25, 1945, the testator and Reynolds, by a writing, agreed to organize promptly for themselves a corporation under the name of "Hickok & Reynolds, Inc.," with a relatively small initial capitalization but clearly with the idea that at some time after the incorporation, all the partnership assets would be transferred to the corporation in exchange for additional stock, of which each partner should thus receive an equal amount. Detailed reference was made to possible death of the parties, which was to be at least no obstacle to the incorporation of the partnership. The pertinent provisions are quoted in Footnote 2 below.

Footnote 2. "Thereafter at the request of either partner, or his executor or administrator to the other, or in the event of his prior death to his executor or administrator, the partners as the stockholders of said corporation, will cause the authorized capital stock thereof to be increased to 10,000 common shares of stock of the par value of $100.00 each, and each party agrees that as soon as said capital stock has been so increased, he will duly convey, transfer, and assign to said corporation each and every asset of the partnership, including all good will and business thereof, whether standing

Thereafter on February 10, 1945, the testator executed his will, of which we need mention at this point only one of the final provisions (Item XIV) relevant parts of which are copied in Footnote 3 below. In brief it incorporated the con-

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in the name of the partnership or in the name of individuals, and each said partner agrees that in consideration thereof he will cause the corporation to issue to the partners, one-half to each, shares of capital stock of the corporation of par value equal to the net worth of the partnership as is shown by the audit of the firm. * * *

* * * * * *

"Should the incorporation and organization of said Hickok & Reynolds, Inc. not have been completed and the assets of the firm fully assigned, transferred and conveyed to the corporation at the death of either of the partners hereto, it is agreed that immediately thereafter, without demand the surviving partner, if any, and the executors, or administrators of the deceased partner or partners, will duly assign, set over and transfer all of the assets of said partnership, both real, personal and mixed as hereinbefore provided and will accept and receive the stock of the corporation as payment therefor, as fully and to all intents and purposes as the partners have done prior to death; and that until the consummation of said transfer, assigning and setting over, the surviving partner and the executors or administrators of the deceased partner or partners shall continue to carry on the business of the partnership as fully and with all the powers and to all intents and purposes as though both were then surviving.

* * * * * *

"Each party hereto also agrees that he will, by his duly executed last will and testament, authorize, direct, and empower his executor or administrator to carry out the agreements of this contract and to make the sale, transfer and assignment of the assets provided for herein and accept in payment thereof said stock of Hickok & Reynolds, Inc."

Footnote 3. "On February 16, 1937, the testator and Harry Reynolds, of the City of Cisco, Texas, entered into a contract of copartnership and on the date of January, 1945, entered into an amended and supplemental agreement thereto, which last agreement provided, among other things, for the incorporation and organization of Hickok & Reynolds, Inc., a corporation under the laws of the State of Ohio, and for the conveyance and transfer to said corporation under certain conditions of all of the assets of said copartnership and provided that in the event of the death of either of the partners, the surviving partner or partners would duly assign, set over and transfer to said corporation all of the assets of said partnership, real, personal and mixed, as therein provided, and would accept and receive the stock of said corporation as payment thereof,

tract by reference and *directed* the executors "to join with said Harry Reynolds in assigning * * * to said Hickok & Reynolds, Inc., all right, title and interest in and to the assets of the partnership of Hickok & Reynolds, upon receipt by them of one-half of the stock of said corporation * * *."

About the middle of April, 1945, Hickok & Reynolds, Inc., was incorporated in Ohio more or less as agreed upon, and by about two weeks before Mr. Hickok's death on June 30, 1945, all of the originally authorized capital stock ($25,000) had been subscribed for equally by the two partners, although the greater part of Mr. Hickok's half was not issued until after his death. On July 16, 1945, the authorized capital was increased to the agreed maximum of $1,000,000 par value, and at the same time the corporation accepted a contemporaneously dated proposal from Mr. Reynolds and the executors to transfer to it all of the assets of the partnership in exchange for the assumption of certain debts by the corporation, the payment of approximately $25,000 cash each to Mr. Reynolds and the Hickok estate and the issuance to each of the two latter of stock of $366,000 par value. The properties were accordingly transferred in August, 1945, and the corresponding stock certificates issued respectively to Mr. Reynolds and the executors in 1946.

Assuming, for purposes of discussion, that we are dealing with the simple case of an Ohioan, who dies seized of Texas lands free of any obligation to sell, and whose will makes an ordinary devise of a remainder in such lands to beneficiaries such as the Toledo Society for Crippled Children, it is not disputed or disputable that under proper

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as fully and to all intents and purposes as the partners might have done prior to their death. I therefore direct, authorize and empower my executors promptly after my death to join with said Harry Reynolds in assigning, transferring and conveying to said Hickok & Reynolds, Inc., all right, title and interest in and to the assets of the partnership of Hickok & Reynolds, upon receipt by them of one-half of the stock of said corporation in the amount computed as set forth in said agreement and to assure to the executors full authority, I refer to said contract for the terms and conditions thereof and make said contract a term of this will."

principles of the Conflict of Laws the validity of the devise is to be determined by reference to Texas law (which permits it) and not by the domiciliary statute (which forbids it). Restatement, Conflicts, Sec. 249; Goodrich on Conflict of Laws, (3rd Ed.) Sec. 166; Beale, Conflict of Laws, Sec. 249.1; Stumberg, Conflict of Laws, p. 415; *Paschal* v. *Acklin,* 27 Tex. 174; *Ball* v. *Norton,* 238 S. W. 889 (Tex. Com. App.); *United States* v. *Calcasieu Timber Co.* (5th Cir.) 236 Fed. 196; *Lowe* v. *Plainfield Trust Co.,* 216 App. Div. 72, 215 N. Y. 50; *Jones* v. *Habersham,* 107 U. S. 174, 27 L. Ed. 401.

Nor would the above conclusion be varied by the bare fact that the devise runs to a trustee rather than to the beneficiary direct. Restatement, *supra,* Sec. 241; Goodrich, *supra;* Beale, *supra,* Sec. 241.1; Stumberg, *supra,* p. 431; *Paschal* v. *Acklin, supra.*

Our courts, by reason of their ultimate power over lands situated within our state, no doubt have the *jurisdictional* authority in a given case to vary the above rule and apply the domiciliary law in preference to our own if they should find compelling reasons so to do. But such a case would be a rather exceptional one, since each departure from the usual rule tends to precedential complications and uncertainties in a field of law already difficult enough under the basic rules. Nor do we regard cases of the type now before us as necessarily exceptional. The mere fact that the courts of Ohio happen to have acted first in the matter is no more persuasive to us than the converse situation would be to the Ohio courts, assuming the "full faith and credit" clause not to be applicable. The fact that the administration of the trust is apparently to be directed from Ohio would not seem of great importance. A holding on our part that the remainder gift to the petitioners is valid as to the Texas lands would not unduly complicate the administration of either the estate or the trust. Since the trust admittedly must stay in existence for the twenty-year term stipulated in the will, the validity of the remainder as to the Texas lands would simply mean that at the end of the period those lands or their equivalent would

pass to the petitioners, while the other assets of the trust or their equivalent will pass to the respondent children. Nor do we know of any precedent to the effect that the law, which normally governs the validity of a trust of land, should be waived merely because the land happens to be of less value than the rest of the trust property governed by a different law, or because all of the contending parties happen to reside beyond the state of situs.

As a consequence of the basic rules abovementioned, courts of a state, which is *not* the situs of the land involved in a questioned devise, or devise in trust, are, generally speaking, without right to apply a law different from that of the situs, and their judgments assuming such a right are not protected by the "full faith and credit" clause of the Federal Constitution. *Clark* v. *Clark*, 178 U. S. 186, 44 L. Ed. 1028. The latter decision holds that, for purposes of "full faith and credit", the courts of the domicile of the testatrix (South Carolina) could not finally determine the will to have worked a conversion into personalty of land situated in Connecticut, so as to deprive the courts of the latter of the power to distribute it as Connecticut realty thereafter, because a contrary holding would violate the rule that the law of the situs governs the matter of testamentary or intestate succession to land. As hereinafter discussed, there is some "conflict in the Law of Conflicts" as to whether the equitable fiction of conversion of realty to personalty, or vice versa, is relevant to the process of choosing between the law of the situs and that of the testator's domicile; but the rule of *Clark* v. *Clark, supra*—that the issue of conversion *vel non* is determined by the law of the situs of the land said to be converted—does not appear to be questioned. Restatement, Conflicts, Sec. 209; Goodrich, *supra*, Sec. 166, (p. 509); Beale, *supra*, Sec. 209.1. As these same authorities demonstrate, the question of whether a particular thing is to be treated or regarded as moveable or immoveable must be determined in the first instance and as a basis for the operation of the Conflict of Laws by the law of the state where the thing is

actually situated. Accordingly, the question presented to us cannot be considered as already finally determined by the Ohio courts, even if the words of the latter might indicate that such was their own understanding of their decree. Conceivably, if the petitioners had voluntarily invoked a decision of the Ohio courts on the very point of whether the gifts were valid as to the Texas lands, we might defer to the result. But such was not the case, nor evidently did the Ohio tribunals so consider it. In the probate court, the executors and trustees did apparently make the point that there was an equitable conversion—and no doubt with the object of securing a declaration that the Ohio statute governed even as to foreign lands of the testator, but the judge, while apparently of the opinion that *we* would or should hold that the Ohio statute governs as the result of an equitable conversion, rather clearly indicated that the final answer lay with the Texas law and Texas courts. The Supreme Court of Ohio does not discuss the point, although, having the matter of the validity of the gifts obviously before it to the extent of the moveable property of the testator, it had to determine that much and held the gifts void against the contention that the respondents, the children, had waived their right to invoke the statute by accepting benefits under the will, 98 N. E. 2d 815, 818.

What has been said would appear to dispose also of any idea that the instant suit of petitioners presents merely theoretical issues. The suggestion presumably is that the fact of the testator's domicile in Ohio, the existence of the Ohio statute and the decree of the Ohio courts separately or together indicate on the part of the latter a purpose of policy to defeat the gifts, by one means or another, even though, as to the Texas property, we should hold them to be valid under proper principles of the Conflict of Laws. The means in question apparently are the power of the Ohio courts over the *parties* concerned in the matter, including the Ohio corporation, Hickok & Reynolds, Inc. But obviously, neither the statute nor the decree evidence a purpose to employ compulsive jurisdiction over persons in

order to thwart proper decisions of other states. Nor would any such unlikely purpose be effective. *Clark* v. *Clark, supra.* If Ohio has physical power over our Ohio petitioners and the Ohio corporation, we in turn have physical power over the Texas property and can at least effectively deprive the respondents, the corporation or even the executors and trustees of its enjoyment. If we decide for the petitioners, the only reason the Ohio courts might entertain to disregard our decision would be that we have disregarded rules of the Conflict of Laws, and the correctness of such a conclusion would, of course, be for final determination by the Federal Supreme Court, as evidenced by the *Clark* case. The question of the effectiveness of our decision is thus no more nor less than what the petitioners call upon us to decide—whether under the rules of the Conflict of Laws we should or should not apply the Texas law to the will, so as to hold the petitioners to be *cestuis que trustent* of a valid remainder in the Texas property.

The position of the petitioners is, in substance, that the case is comparable to the aforementioned example of a simple devise or devise in trust of Texas lands, and this notwithstanding the "fund" terminology in respect of final distribution of the corpus and, as regards the partnership property, notwithstanding the contract and all the other special circumstances heretofore described. The opposing thesis of the respondents is that these circumstances, by the law of Texas as well as that of Ohio, present a case of equitable conversion of all the testator's estate into personalty, with the result that we must regard the will as involving only personalty. Similarly, they appear to say that the will left the petitioners no interest in the Texas property (or other specific property of any kind). Either approach, they argue, forecloses application of any law except that of the testator's domicile to the matter of validity of the trust remainder.

We will consider first the partnership property. The fact that since the testator's death, it has been put into the form of corporate stock does not of itself affect the problem, because we are dealing with the validity of what the

testator himself did, as judged by the applicable law, which depends on what kind of property he had at his death, rather than what kind exists at the time of litigation. As to what happened before his death, it may doubtless be conceded that the will alone, without aid of the subsequent conduct of the testator himself in the organization of the corporation, shows a clear intent that his interest in the partnership should be put into the form of corporate stock at the earliest practical date after his death. The situation is thus comparable to one wherein the testator instructs his executor to trade his land for corporate stock and give the stock to the beneficiary. Or, looking at the contract between the testator and his partner, it is not unnaturally argued that this alone, and aside from the will, was enough to change into a moveable or personalty that which had previously been an interest in immoveables or land, as would obviously have been the case had the testator sold his interest and received, before his death, stock, cash or an unsecured promissory note in return. That, but for the contract, the testator had, through his partnership interest, an interest in land, does not seem to be contested. *Munsey* v. *Mills & Garitty,* 115 Tex. 508, 283 S. W. 754.

Assuming the theory of equitable conversion to be relevant to the process of determining the applicable law, then, looking at the case from the standpoint of either the will itself or the contract or both, there are presented situations of the type in which our courts, for at least certain domestic law purposes, declare a conversion to have been effected. In *Hardcastle* v. *Subley,* 107 S. W. 2d 432 (Tex. Civ. App., writ of error refused) a direction in the will of Mrs. Crosby to sell land and distribute the proceeds to the beneficiary (Mrs. Wood) was held to convert the land in question into personalty so as thereafter to pass as such by the will of the beneficiary herself. (The fact that Mrs. Crosby's executors had actually sold the land after her death was said to be immaterial.) The case is also authority for the point that where the testator's contract of sale of his land is virtually carried out during his lifetime, the land is treated as per-

sonalty for the purposes of the will. In *Willie* v. *Waggoner,* 181 S. W. 2d 319 (Tex. Civ. App., writ of error refused) the testator, who had written his will so as to devise his ranch to a friend, with the residue of his estate to go to a sister, thereafter entered into an earnest money contract to sell the ranch. This was actually held not to be an ademption of the devise through conversion, but only for the reason that the right of the purchaser to withdraw from the contract by mere forfeiture of his earnest payment rendered it not specifically enforceable.

There appear to be no Texas decisions on the point of whether rules of equitable conversion are to be used in determining whether the nature of the property in question is such as to invoke the law of the situs or that of the domicile. And those very few cases from other jurisdictions, which seem to consider such rules as relevant, apparently follow the same principles exemplified in our Texas decisions in deciding whether a given set of facts is one of conversion or otherwise. The Wisconsin and Michigan decisions in connection with the same will, *Ford* v. *Ford,* 70 Wis. 19, 33 N. W. 188; 80 Mich. 42, 44 N. W. 1057, held that the direction to the executors to sell land situated in those states and invest the proceeds in Missouri land to be held in trust, effected a double conversion from land to money to Missouri land, with the result that the Wisconsin and Michigan rules against perpetuities, which would otherwise have invalidated the trusts as to the Wisconsin and Michigan lands of the testator, had no application. But, as to the property which the will gave no positive direction to sell, it was held that no conversion occurred. *Penfield* v. *Tower,* 1 N. D. 216, 46 N. W. 413 actually held that no conversion was effected by the terms of a testamentary trust of North Dakota land and personalty for several beneficiaries, not greatly different from that of the Hickok will, and accordingly applied the North Dakota rule against perpetuities, as against that of Pennsylvania, the testator's domicile, thus defeating the trust to the extent of the North Dakota land. But the implication is rather clear that, had

the will necessarily disclosed an "intent" for the land to be sold, the court would have applied the domiciliary law, on the conversion theory. The English decision, *In re Piercy* (1895), 1 Ch. 83, is reliably considered as (though criticized for) having "proceeded largely on the ground that the will effected an equitable conversion of the land into personalty", in holding English law to govern the effect of a devise by an Englishman of Italian land to a trustee with direction to sell and invest the proceeds in English securities or land. See Beale, *supra,* pp. 958-9.

Contrary to the decisions, or implications thereof, last mentioned are the English and Canadian cases of *Re Berchtold* (1923), 1 Ch. 192, and *Re Burke* (1928), 1 D. L. R. 318, each of which, both in result and words, and with considerable citation of English authority, clearly refuses to base the choice between conflicting laws of the situs and domicile upon the principle of equitable conversion. In the first, English land was devised by a Hungarian in trust for the very purpose of being converted to money and thus distributed to two Hungarian beneficiaries, both of whom died intestate before the sale was made. It was held that: (a) the nature of the interests of these beneficiaries as *moveables* or *immoveables* should be determined by English law; (b) by that law the interests were immoveables; (c) their distribution was accordingly to be made without regard to the law of the domicile of the two deceased owners and according to English law; (d) the latter requiring that such interests be distributed as *personalty* (although *immoveables*) they should go to the persons who by English law would take the *personalty* of a deceased English intestate. Thus, although by English law, the interests in question were *personalty* for distribution purposes, they were yet immoveables for purposes of determining whether the laws of England or those of Hungary applied. In discussing the latter question, the court said that the point of whether the interests were regarded as realty or personalty under principles of conversion or otherwise had nothing to do with the choice of which of the conflicting laws of England and Hungary should govern. The court cites various instances

of interests, which by the law of England are immoveables, some of them being doubtless personalty by that same law and many entailing no actual benefits to the owner except in the form of money. (A common example given elsewhere is that of a leasehold, which, for purposes of the Conflict of Laws, is an immoveable—an interest in land—although treated as personalty for some domestic purposes. Restatement, *supra*, Sec. 249, Comment d.)

Re Burke, supra, held that where an American contracted to sell his Canadian land and then died intestate, the distribution of his estate was governed by the law of Canada, rather than the domiciliary law, to the extent of this land or its proceeds, including the money which had been actually paid after his death for one particular tract. The court not only declared the fiction of equitable conversion to be irrelevant to the choice between conflicting laws, but also rejected the suggestion that, as a result of *actual* conversion, the intestate died possessed of merely a chose in action for money, while the purchaser was the owner of the land, thus holding the interest of the intestate at death to be an interest in land, subject to the contract.

In *Lowe* v. *Plainfield Trust Co.,* 216 App. Div. 72, 215 N. Y. 50, which is said in some texts to reject the conversion theory as applicable to cases of conflicts of laws, the result was to apply to charitable devises of New York land the New York statute against charitable gifts by will exceeding half of the estate (as against the domiciliary law by which the gifts were valid) despite an actual sale of the lands by the executors subsequent to the testator's death, pursuant to a power given in the will. This sale was the basis of a contention that the domiciliary law should apply on the theory of conversion. The court answered this by the statement that a party could not rely on the sale for conversion purposes unless the will authorizing the sale were valid, and that the latter was the very point in issue. The decision can hardly be considered an American counterpart of *Re Berchtold* or *Re Burke,* both *supra.*

Norris v. *Lloyd,* 183 Iowa 1056, 168 N. W. 557, sometimes cited against the conversion thesis, applied the law

of the situs (Iowa) to uphold the gift of a Californian, whose will directed his executor to sell the Iowa land and distribute the proceeds to the testator's "children", the latter meaning by Iowa law only legitimate children. By the California law, his illegitimate but recognized son would have taken a portion notwithstanding such a will. It was evidently argued without effect that, because of conversion, the California law should apply, but the opinion is less than clear as a holding that equitable conversion is irrelevant to the choice between conflicting laws.

Among the text writers, Goodrich (*supra,* Sec. 166, p. 508) alone appears to accept the conversion thesis on the strength of cases such as *Ford* v. *Ford, supra,* while others take a definite stand against it. Beale, *supra,* Secs. 208.1, 209.1, 251.4, 306.6; Stumberg, *supra,* p. 337, footnote 4; Falconbridge, 18 Canadian Bar Rev. 568. The Restatement (*supra,* Sec. 249, Comments c and d, Sec. 306, Comment f) is in accord with these latter views.

One other decision should doubtless be mentioned. In *Jenkins* v. *Guarantee Trust & Safe-Deposit Co.,* 53 N. J. Eq. 194, 32 A. 208, the Pennsylvania testatrix had (in effect) land in New Jersey and certain other property, the value of the latter being just enough to pay her debts. Her will made several money bequests, including primarily one of $5,000 to a Pennsylvania charity, and devised all lands to the executor with express authority to sell in order to pay debts or legacies generally. By a Pennsylvania statute such a gift to charity would be void, since the will was executed less than a month before death; but New Jersey had no such statute. It was evidently argued that the domiciliary law applied on the theory of equitable conversion, the lower court rejecting the contention on the ground that the will gave no positive direction to sell. The New Jersey Court of Error and Appeals reversed and applied the domiciliary law, stating that the matter of conversion was immaterial, since the will made a mere money bequest to the charity rather than a devise. In our view, the language of the opinion suggests a different result if, for example, the will had expressly provided

that the $5,000 in question should be paid out of the proceeds of sale of the land. In any event, the court disclaims reliance on the theory of equitable conversion.

We are disposed to agree with the majority of the text writers, whose view appears to be also the view of the Restatement, that the fiction of equitable conversion from realty to personalty or vice versa, "can have no place in the Conflict of Laws". The generally stated reason seems a sound one, to wit, that this body of law is really private international law and not merely a system for operation between the common or English law states of the United States or between these and common or English law nations. Thus to use as a basis for selection of a particular law between conflicting laws a doctrine which may not even exist in some jurisdictions is obviously less desirable than a more realistic basis such as the moveable or immoveable character of the object in question. As argued by the petitioners, it would in some cases result in state or nation A deferring to the law of state or nation B, when the latter in a converse situation would not reciprocate. It would thus also be more likely to produce unnecessary confusion in particular instances. For example, a domiciliary of nation N may die, leaving cattle there as well as in state S and having made a will directing that all his cattle be sold and converted into land in S, a remainder in which shall go to a charity (to the disappointment of his children who live in N). The remainder, we will assume, is prohibited by a statute of the domicile (N) but valid by the laws of S. We also assume that N does not have the doctrine of equitable conversion, whereas S does. The courts of N would thus probably invalidate the remainder to the extent of the cattle in N on the theory that succession to moveables is ruled by domiciliary law, while the courts of S would probably uphold it as to the cattle in S on the theory that, these being equitably converted to land in S, the law of S should control. Such a result obviously disrupts the otherwise fairly simple operation of the rule that succession to moveables is determined by domiciliary law.

If the instant case were varied so that Mr. Hickok had no land, but directed by his will that all his stocks and bonds should be forthwith converted into Texas land and the land conveyed to the petitioners, one is inclined to doubt if the Ohio courts would uphold the gift on the theory that an equitable conversion made the Texas law applicable. Or, were our case one of a *Texas* testator, who by will directed conversion of his Texas cattle into Ohio land for the use of these Ohio petitioners, we are disposed to question that the Ohio courts would consider the gift invalid on the theory that equitable conversion made the Ohio statute applicable.

Of course, the "characterization" of what the deceased had at his death and what he makes out of it by his will in the course of transmitting it to a given beneficiary, may involve legal, and conceivably equitable, questions necessary to decide in order to say whether the thing passing by the will is a moveable or immoveable. Thus in *Re Burke, supra,* the court analyzes the character of the intestate's property —a combination of land and his contract to sell it—and on legal principles decides that this amounted to an interest in land rather than a mere claim for money, as would have been the case, had he given the purchaser a deed in exchange for corporate stock or even a completely unsecured note. But it requires another step altogether to say—contrary to the actual facts—that the contract had been carried out, and that the intestate therefore had no interest in land, but only money. And, of course, the field of operation of the fiction, that what "ought to be done" is actually done, is quite limited even in domestic law. Where there is question, for example, of whether a mortgage of land may be validly assigned by word of mouth or whether an "oil payment" of X dollars is taxable as land, we do not resolve these problems by first assuming that the mortgage or the oil payment have been paid off. Thus in using legal and equitable principles defining property rights, as a basis for the choice between conflicting laws, we do not necessarily have to use also the fiction of conversion.

We need not, therefore, decide whether in a proper case for the domestic application of equitable conversion, the partnership mineral interests herein in question would be regarded as personal property for the purposes of the will. It is enough to say that at Mr. Hickok's death he was the owner of a half interest in these minerals, subject to a contract that they should be converted into corporate stock, just as the land of the deceased in *Re Burke, supra,* was subject to a contract of sale. And the circumstance that the will, in effect, directs the contract to be carried out, does not change the fact that, on Mr. Hickok's death, what passed for the benefit of the petitioners and others was his interest in the minerals, just as in *Re Berchtold, supra,* the devise of land in trust to be sold for the use of the beneficiaries passed to the latter an interest in the land. If this view should impress some as legalistic in the sense of excluding the intent of the testator that his mineral interest should become corporate stock, it is hardly more of a "technical" approach than that of regarding "as done" that which was *not* done, in order to deprive the petitioners of the last remnant of benefits the testator obviously intended them to have, and, in effect, to enforce here a legislative policy of Ohio, which is contrary to the policy of our own Legislature.

The view most stressed by respondents in this court is that the will purports to give no interest in immoveables to the petitioners, and it is said that this was what the Court of Civil Appeals had in mind in speaking of the contingent character of the interest in question. (Certainly a contingent interest in land is an interest in land, if it is anything at all, and as such its validity is as much a matter of the law of the situs as is any other interest in immoveables. Restatement of the Law, Property, Sec. 162, Comment d). There would be more point to the argument, if the trust had provided that these petitioners should have no benefit out of any land passing to the trustees, or out of its proceeds, but such is not the case. To argue that the will is no will of immoveables so far as the petitioners are con-

cerned is in substance to say that, for example, a testamentary "spendthrift" trust of a large farm and one cow, to pay the income to X for life and the principal thereafter to Y, coupled with discretionary power of the trustee to sell and invest the proceeds in personalty or other lands, gives no interest in land to either beneficiary, and this clearly is unsound. By the same token, no beneficiary in the instant case would have an interest in either moveables or immoveables, so there is no reason to apply either the law of Ohio or that of Texas. The argument is really no more than another way of injecting the thesis of equitable conversion.

A fortiori we conclude also that our law governs the validity of the trust remainder with respect to the Texas interests owned by Mr. Hickok individually at his death. Indeed, as to these interests, there is insufficient ground on which to claim equitable conversion. The observation of the learned Ohio probate judge, that the division of the corpus into simple fractions for final distribution purposes necessarily involves converting it into money, seems irreconcilable with provisions of the will, such as the plain authority of the trustees to hold the original assets and to make ultimate distribution in kind (as well as money) at valuations within their own exclusive discretion. The very paragraph which is said to make the remainder "contingent" provides that the petitioners must at the time of distribution be able to accept a "devise", without certain tax consequences, as well as a "bequest", and actually uses the same studied language twice. And since the trustees are given the express power to invest and reinvest in "real estate" as well as in other things, one might, fictionally speaking, argue quite as logically that the whole will was one of land as that it was one of personalty. The word "fund", used briefly as aforesaid, and easily susceptible of a meaning such as "portion", certainly does not control everything else in the will to the extent of requiring that every asset of the trust except cash be sold, with all the attendant expense and possible depreciation of values. And

there is no more indication that lands are to be sold than corporate securities. Land can be conveniently valued for distribution purposes in terms of dollars per acre, just as stocks can be valued in dollars per share.

The effect of the foregoing being to hold that as to all the above-mentioned lands, and mineral interests in lands, situated in this state, the will of Arthur S. Hickok is valid and passed to the petitioners the interests in trust which it purports to pass, it follows that the judgment of the Court of Civil Appeals should be reversed and the judgment of the trial court modified so as to conform to our holding. It is so ordered.

W. St. John Garwood,
Associate Justice.

Associate Justice Griffin dissenting.

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FILED

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 590

CLARENCE H. HICKOK, RUTH HICKOK MARVIN, R. W. MARVIN and DAISY S. HICKOK,

Petitioners,

vs.

TOLEDO SOCIETY FOR CRIPPLED CHILDREN, Toledo, Ohio; RIVERSIDE HOSPITAL, Toledo, Ohio; MERCY HOSPITAL, Toledo, Ohio, ET AL.,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Respondents Toledo Society for Crippled Children, Toledo, Ohio, and other charitable organizations oppose petitioners' application for a writ of certiorari to the Supreme Court of Texas for the reason that no federal question is presented.

Opinions Below

The opinion of the district court of Eastland County, Texas, is not reported but a copy appears as Exhibit "A" at pages 18-21 of the Petition. The opinion of the Texas Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, at Eastland, is reported at 252 S. W. (2d) 739, and a copy thereof appears at pages 22-28 of the Petition as Exhibit "B". The opinion of the Supreme Court of Texas is reported at 261 S. W. (2d) 692, and a copy thereof appears at pages 29-47 of the Petition as Exhibit "C".

The opinion of the Probate Court of Lucas County, Ohio, is not reported but is incorporated verbatim in the opinion of the Court of Appeals, Lucas County, Ohio, and is reproduced in the Transcript of Record at pages 143-162. The opinion of the Court of Appeals, Lucas County, Ohio, is not reported but is reproduced in the Transcript of Record at pages 142-162. The opinion of the Supreme Court of Ohio is reported at 155 Ohio St. 293, and is reproduced in the Transcript of Record at pages 162-171.

Jurisdiction

Petitioners present no federal question and hence no question of which this Court has jurisdiction. They assert as their ground of jurisdiction that the Supreme Court of Texas failed to give the full faith and credit required by Article IV, Section 1, of the Constitution of the United States to a judgment of the Court of Appeals, Lucas County, Ohio, that was affirmed by the Supreme Court of Ohio. (Petition,

pp. 2-4.) Petitioners say that judgment determined that the will of Arthur S. Hickok is invalid insofar as it gives respondents interests in real property situated in Texas or in the proceeds thereof whereas the Supreme Court of Texas held the will to be valid in this respect. (Petition, p. 4.)*

No federal question is presented because, as clearly appears from the judgments and opinions of the courts of Ohio, those courts did not determine whether Hickok's will is valid or invalid insofar as it gives respondents interests in Texas real property or in the proceeds thereof; on the contrary the Ohio courts *expressly* recognized their lack of jurisdiction to determine this issue. (See pp. 8-13, *post.*)

Questions Presented

Two questions are presented, only one of which is stated by petitioners and their statement is inaccurate. Correctly stated, the two questions are as follows:

(1) Do the courts of Texas or those of Ohio have jurisdiction to determine whether Hickok's will is valid or invalid insofar as it gives respondents interests in real property situated in Texas or in the proceeds of the sale or exchange of such property? (See pp. 13-24, *post.*)

(2) Did the courts of Ohio purport to decide the question just stated or did they recognize that the

*As hereinafter shown petitioners do not accurately state the question, if any, presented to this Court. We state here the only issue that could possibly be presented.

issue should be decided by the courts of Texas? (See pp. 8-13, *post.*)

Determination of the first question, inaccurately stated by petitioners, must be made in the light of the facts existing as of the date Hickok died and not as of some date thereafter. This is the law in all common law jurisdictions, including Texas and Ohio. *Ohio National Bank of Columbus v. Boone,* 139 Ohio St. 361; *Haley v. Gatewood,* 74 Tex. 281. As of the moment Hickok died his estate was the owner of real property situated in Texas that had not been conveyed to Hickok & Reynolds, Inc., in exchange for capital stock in that corporation. This exchange took place approximately seven weeks *after* Hickok's demise.

In their statement of the question presented petitioners ignore the facts existing when Hickok died. They present the situation as it existed *after* Hickok's death and *after* the real property in Texas had been exchanged for the capital stock. Petitioners say that after the exchange the courts of Ohio adjudicated the rights of the parties to the capital stock and that the issue presented here is whether the courts of Texas may disregard this adjudication.

Such an adjudication as that referred to by petitioners, even if made by the Ohio courts, would of necessity be bottomed upon and follow from determination of the *basic issue* of whether Hickok's will is valid or invalid insofar as it gives respondents interests in Texas real property or in its proceeds. That the fundamental issue presented to the Ohio courts was as to the validity or invalidity of Hickok's will insofar as it makes devises or bequests to re-

spondents is apparent from the fact that the only questions really considered in the opinions of the Ohio courts are: (1) Was Hickok's will valid or invalid with respect to the devises and bequests to respondents?; and (2) were petitioners precluded from invoking the Ohio statute that they contended rendered the will invalid in the respect just stated? (R. 143-158, 162-170.) While the Ohio courts determined these questions only insofar as the will applies to property of which they had jurisdiction (see pp. 8-13, *post*), their opinions clearly reflect that the real issue between petitioners and respondents is whether the will is valid or invalid insofar as it makes devises and bequests to respondents. Consequently, the only questions, if any, presented to this Court are (1) whether the Ohio courts purported to determine this issue insofar as the will gives respondents interests in Texas real property or in its proceeds and (2) whether, if the Ohio courts purported to adjudicate the issue, such adjudication *must* be respected by the Texas courts.

Statement of the Case

Hickok's will leaves the bulk of his estate in trust for twenty years, the trust income to be paid to the family and to certain employees of corporations in which Hickok had been interested. The will directs the trustees to divide the assets of the trust at the end of the trust period and to distribute such assets in kind, or otherwise, to twenty charitable institutions, nineteen of which are respondents herein. (R. 66-82.)

When Hickok died he owned in his own right real property situated in Texas; and as an equal partner in the partnership of Hickok & Reynolds owned an undivided one-half interest in other real property situated in Texas. (R. 2-5, 99.) Under Texas law, as conceded by petitioners, Hickok's interest in the partnership real property constituted an interest in the real property itself and not an interest in personalty. (R. 119.) *Munsey v. Mills & Garitty*, 115 Tex. 469; *McLean v. Hargrove* (Tex. Com. App.), 162 S.W. (2d) 954.

Prior to his death Hickok and his partner Reynolds entered into a partnership agreement and an amendment thereto providing that upon the death of either partner the surviving partner and the estate of the deceased partner would transfer all of the assets of the partnership to a corporation and would accept its capital stock in full payment therefor. (Ohio Exhibits 3 and 4 attached to Stipulation in Texas proceeding, R. 33.)

The corporation contemplated by the partnership agreement was incorporated shortly prior to the death of Hickok, each partner subscribing for 250 shares of its capital stock of the par value of $10.00 each. The partners paid for such stock through a bookkeeping transaction by which charges were made to their loan accounts in the partnership of Hickok & Reynolds. (Eisenhour testimony, p. 129; Ponsler's testimony, p. 141; Ohio record, R. 33.)

Through Item XIV of his will Hickok instructed the executors of his estate to carry out the foregoing agreement by conveying his interest in the partnership property to Hickok & Reynolds, Inc., in consid-

eration of one-half of the capital stock of said corporation. (R. 80-81.)

Approximately seven weeks after Hickok's death the executors of his estate, pursuant to the provisions of Hickok's will, conveyed all of the deceased's interest in the partnership of Hickok & Reynolds (being an interest in Texas real property) to Hickok & Reynolds, Inc., in exchange for 3,912 shares of its capital stock of the par value of $100.00 each. (Eisenhour testimony, p. 141; Ohio Exhibit K attached to Stipulation in Texas proceeding; R. 34.)

Ancillary administration on the property of Hickok's estate situated in Texas was begun in 1945 when the county court of Eastland County, Texas, appointed Walter Kirkbride, et al., Texas executors. (R. 2.) This ancillary administration in Texas has never been completed; no assets of the estate in Texas have been transferred to the domiciliary administration in Ohio; and the 3,912 shares of capital stock of Hickok & Reynolds, Inc., received by the estate when the assets of the partnership were transferred to the corporation have been held by the Texas executors from the time of their issuance to the present time. (R. 104-105.)

In August, 1946, the domiciliary executors instituted the Ohio proceeding that petitioners claim resulted in a judgment that has not been given full faith and credit by the Supreme Court of Texas. (R. 38-44.) While the Ohio proceeding was pending but before it was heard on its merits respondents herein (as plaintiffs) instituted the instant proceeding in a district court of Texas. (R. 1-15.)

When the Ohio proceeding came on for trial respondents herein offered in evidence a certified copy of the petition filed in the Texas proceeding and contended that the courts of Ohio were without jurisdiction to determine whether Hickok's will was valid or invalid insofar as it gave respondents interests in Texas real property or in the proceeds thereof.

In the Ohio proceeding the Lucas County probate court held that under an Ohio statute* Hickok's will was invalid insofar as it made devises and bequests to respondent charities. However, the Lucas County probate court expressly recognized its lack of jurisdiction to determine whether Hickok's will was valid or invalid insofar as it gave respondents interests in Texas real property or in the proceeds thereof, thereby recognizing its lack of jurisdiction to determine the devolution of the Texas properties. Said that court:

"Coming now to consider the provisions of the will as they relate to the property of the decedent in Texas and New Mexico. The evidence establishes the fact that the oil leasehold interests and royalty interests are considered by the laws of Texas to be real estate.

"It is contended on behalf of the executors and trustees that the doctrine of equitable conversion applies and that those interests are to be considered as personalty. (R. 150.)

"* * *

"It is the opinion of the court that the terms of the will, and the partnership agreements in evidence, show an intention of the testator to have all the prop-

*Ohio General Code, Section 10,504-5.

erty considered as personal property; in other words, to constitute an equitable conversion. (R. 151.)

"* * *

"*The opinion of this court as to the equitable conversion, however, can not be a controlling judgment. The courts of Texas will determine the effect of the will as it relates to real estate located in that state.* The true rule is concisely stated in Vol. 4, Page on Wills, Sec. 1633, page 688, as follows:

" 'The state within whose boundaries a tract of realty is situated has exclusive jurisdiction to create, terminate, etc. all the rights which exist in such realty, no matter where the owners of the different rights may be domiciled.'

"The United States Supreme Court in DeVaughn vs. Hutchinson, 165 U. S., 566, say:

" 'It is a principle firmly established that under the law of the state in which the land is situated, we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and its other conveyances.'

"The Texas courts recognize the doctrine of equitable conversion, and *may* arrive at the same conclusion." (R. 151-152.)

The judgment entered by the probate court tracks its opinion by adjudicating the status of the 250 shares of capital stock of Hickok & Reynolds, Inc., owned by Hickok *at the time of his death* and by *not* adjudicating or *even mentioning* the status of the 3,912 shares of such stock received by Hickok's estate when the assets of the partnership were transferred

to the corporation. With respect to the 250 shares of stock first mentioned the judgment provides:

"19. That 250 shares of stock of Hickok & Reynolds, Inc., was the property of Arthur S. Hickok at the time of his death and are assets of his estate being administered in the Probate Court of Lucas County, Ohio." (R. 50.)

An appeal was taken by respondents herein from the above described judgment to the Court of Appeals for Lucas County, Ohio, but petitioners herein took no appeal from said judgment insofar as it failed to adjudicate the status of the 3,912 shares of stock in Hickok & Reynolds, Inc. (R. 142.) The Court of Appeals entered the same judgment as that entered by the probate court and adopted as its opinion the opinion of the probate court. (R. 142.)

Respondents herein appealed from the judgment of the Court of Appeals to the Supreme Court of Ohio and that court affirmed the judgment of the Court of Appeals. *Kirkbride v. Hickok*, 155 Ohio St. 390. (R. 61-62, 162-171.) Since petitioners herein had taken no appeal from the judgment of the Lucas County probate court insofar as it failed to adjudicate the status of the 3,912 shares of stock, there was no occasion for the Supreme Court of Ohio to in any way consider the question of whether Hickok's will was valid or invalid insofar as it gave respondents herein interests in Texas real property or in the proceeds thereof. (R. 162-171.)

Argument

(1) *Since the Ohio courts did not adjudicate the issue of whether Mitchell's will is valid or invalid insofar as it gives respondents interests in Texas real property or in its proceeds, there is no Ohio judgment that has been or that could be denied full faith and credit by the Supreme Court of Texas; hence no federal question is presented.*

As shown at page 10, *ante*, the judgment of the Ohio Court of Appeals expressly adjudicates that the 250 shares of corporate stock of Mitchell & Reynolds, Inc., acquired by Mitchell when the corporation was organized "was (are) the property of Arthur S. Mitchell *at the time of his death* and are assets of his estate *being administered* in the Probate Court of Lucas County, Ohio." But this judgment does not adjudicate or recite that the 3,332 shares of capital stock of Mitchell & Reynolds, Inc., acquired by the estate of Mitchell after his death in exchange for the interest of the estate in Texas real property "was (are) the property of Arthur S. Mitchell at the time of his death"; nor does the judgment adjudicate or recite that such shares "are assets of his estate being administered" in Ohio. On the contrary the judgment makes no reference whatsoever to the 3,332 shares of stock. The judgment will more plainly indicate that it does not determine the issue of whether the Mitchell will is valid or invalid insofar as it applies to Texas real property or the proceeds thereof.

It is elementary that the judgment of the Ohio Court of Appeals should be construed in light of the

opinion of that court. In its opinion the court states: "The courts of Texas will determine the effect of the will as it relates to real estate located in that state." (R. 151.) This language in the opinion and the other language therein quoted at pages 8-9, *ante*, plainly show *why* the judgment entered by that court adjudicates nothing with respect to the 3,912 shares of stock. Certainly the language of the opinion prevents reading into the judgment any provisions determining the issue of whether Hickok's will is valid or invalid insofar as it applies to the Texas real property or its proceeds.

The provisions in the judgment applicable to the 250 shares of stock acquired by Hickok before his death and the absence of any reference whatsoever to the 3,912 shares acquired by his estate after his death plainly refute any argument that the judgment is concerned in any way with the 3,912 shares. In any event that part of the judgment applicable to the 250 shares plus the absence of any language therein referring in any way to the 3,912 shares plus the plain statement in the opinion that the courts of Texas must determine "the effect of the will as it relates to real estate located in that state" show beyond cavil that the Court of Appeals of Ohio did not intend to determine and did not determine the issue of whether Hickok's will is valid or invalid insofar as it applies to Texas real property or to the proceeds of the sale or exchange of said property.

The most that can be said in support of petitioners' position as to the Ohio proceeding is that the opinions of the two lower courts reflect the *hope*, perhaps the belief, of such courts that the courts of Texas would

hold the doctrine of equitable conversion to be applicable to the Texas real property, thereby converting such real property into personalty, the devolution of which should be governed by the laws of Ohio, and thereby rendering Hickok's will invalid insofar as it gives respondents interests in Texas real property or in the proceeds of the sale or exchange of such property. That the hopes of the Ohio courts were dashed by the opinion of the Supreme Court of Texas may reflect their inability to pierce the veil that hides the future but in no way shows that any judgment entered in Ohio has been denied full faith and credit by the Supreme Court of Texas.

(2) *If the Ohio courts had entered a judgment purportedly controlling the devolution of the Texas real property, such judgment would have been void for want of jurisdiction and would not have been entitled to full faith and credit under Article IV, Section 1, of the Constitution of the United States.*

If the Ohio proceeding *had* resulted in a judgment purportedly determining the issue of whether Hickok's will is valid or invalid insofar as it gives respondents interests in Texas real property or in the proceeds thereof, such judgment would be void for want of jurisdiction in the Ohio courts and would not be entitled to full faith and credit in the Texas proceeding. This Court has long since determined that the courts of the State of the *situs* of real property have exclusive jurisdiction to determine issues concerning the validity and effect of a will devising such realty or interests therein. More specifically this

Court has decided that courts of the State of the situs of real property have jurisdiction to determine whether such realty is to be regarded as equitably converted by will into personalty for purposes of devolution; and that the courts of the testator's domicile, where the situs and domicile are in different jurisdictions, have no jurisdiction in the premises. *Clarke v. Clarke*, 178 U. S. 187; *DeVaughn v. Hutchinson*, 165 U. S. 566. It follows that the courts of the situs are not required by the full faith and credit clause to defer to the judgment of the courts of the domicile in determining how real property or its proceeds devolutes by will.

In its opinion that petitioners claim denies full faith and credit to a judgment entered in the Ohio proceeding, the Supreme Court of Texas reached these conclusions (R. 117-134):

(1) That at the time of Hickok's death the property interests involved were real property under Texas law.

(2) That under the law of Texas the Texas real property did not lose its character as realty by virtue of Hickok's will or the partnership agreement and amendment thereto between him and Reynolds; that the doctrine of equitable conversion was inapplicable.

(3) That the issue of the validity of the will insofar as it is applicable to the Texas real property must be determined by reference to the law of Texas; that under that law the will is valid; and that as a consequence respondents are entitled to the interests in Texas real property or in the proceeds thereof given them in the will.

It would appear from petitioners' argument that they desire this Court to hand down an advisory opinion enlightening them as to the line of demarcation between *Clarke v. Clarke supra*, and such cases as *Dull v. Blackman*, 169 U. S. 243, and *Fall v. Eastin*, 215 U. S. 1. Petitioners also suggest in a mild way that the courts and other recognized authorities may have misconstrued the *Clarke* case.

In the *Clarke* case a testatrix domiciled in South Carolina and owning real property in Connecticut died leaving a will that gave the residuum of her estate in equal parts to her husband and two minor children, one of whom died shortly thereafter. The husband as executor filed suit to construe the will in the courts of the decedent's domicile, South Carolina. The courts of that state held that upon the testatrix's death the will equitably converted into personalty all realty of the testatrix wherever situated and that the executor was authorized to sell all of such real property and to account to the South Carolina courts for the same as personalty.

Under South Carolina law the estate of the deceased child vested in equal shares in the father and the surviving daughter; under Connecticut law the surviving daughter took the entire share of the deceased child. Consequently, if the Connecticut real property were to be regarded as personal property the father and daughter would take because South Carolina law would be applicable whereas if the property remained realty the daughter only would take because Connecticut law would be controlling.

The husband and father as administrator of the deceased daughter's estate instituted in the courts

of Connecticut an action to determine the devolution of the real property there situated and in that proceeding it was held that the surviving daughter was the sole heir and distributee of her deceased sister. Upon appeal by the father individually he contended that the judgment entered in the South Carolina proceeding had foreclosed the issue of whether the real property in Connecticut was realty that devolved under Connecticut law or was personalty that devolved under South Carolina law; that such decision "in its interpretation and construction of the will of the said Julia H. Clarke, to the effect that said will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix, wherever situated, was binding and conclusive on the courts of" Connecticut. (178 U. S. 189.)

The Supreme Court of Connecticut handed down a final judgment holding that no equitable conversion had been effected by the will and the Supreme Court of the United States entertained jurisdiction because of the question raised under the full faith and credit clause, Article IV, Section 1, Constitution of the United States, and affirmed the decision of the Supreme Court of Connecticut.

In the *Clarke* case this Court held that the courts of the domicile of a testatrix have no jurisdiction to determine whether or not the fiction of equitable conversion should be applied to foreign realty thereby converting such realty into personalty, of which the courts of the domicile would have jurisdiction.

Petitioners suggest that the interpretation always given to the opinion that Mr. Justice White handed down in the *Clarke* case in 1900 may be incorrect.

This suggestion is apparently based upon the fact that the daughter, a minor, was represented in the South Carolina litigation by a guardian *ad litem*. This Court pointed out, as a corollary of its basic holding that the South Carolina court lacked jurisdiction to adjudicate on the subject of the devolution of Connecticut real property, that the guardian *ad litem* had no authority to act on her behalf in the South Carolina proceeding with reference to the Connecticut realty. (Petition, p. 16.)

That petitioners' suggestion is without substance is made plain at the very outset of Mr. Justice White's opinion where he summarizes the *sole* issue presented to this Court as follows:

"The Supreme Court of Errors of Connecticut held that the will of Julia H. Clarke, wife of the plaintiff in error, did not at the time of her death work an equitable conversion into personalty of the real estate situated in the State of Connecticut, and, consequently, that though personal property might be governed by the law of the domicil, real estate within Connecticut was controlled by the law of Connecticut, and hence that Nancy B. Clarke, as surviving sister of Julia Clarke, inherited under the laws of Connecticut, to the exclusion of the father, the interest of the deceased sister Julia in the real estate in Connecticut which had passed to Julia by the will of her mother. It is assigned as error that in so deciding the Connecticut court refused full faith and credit to the decree of the courts of South Carolina, wherein it was adjudged that the will of Mrs. Clarke had the effect of converting her real estate, *wherever situated*, into personalty; the deduction being that as under the South Carolina decision the real estate situated in Connecticut became personal property,

it was the duty of the Connecticut court to have decided that the land passed by the law of South Carolina and not according to the law of Connecticut, and hence, that instead of treating the daughter Nancy as the owner of the whole of the real estate, it should have recognized the father as having a half interest therein. And the correctness of this proposition is really *the only question* which the assignment of errors presents for our decision." (178 U. S. 189-90.)

Thus it is absolutely clear that the decision did not go off on a side issue having to do with the defect of parties—as suggested by petitioners.

In the *Clarke* case this Court summarizes the contention of the plaintiff in error who contended the Connecticut decree failed to give full faith and credit to the South Carolina judgment as follows:

"The proposition relied on, therefore, is this, although the court of last resort of Connecticut (declaring the law of that State) has held that the real estate in question had not become personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed." (178 U. S. 191.)

This Court paraphrased the foregoing contention in the following language:

"This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut where the real estate is situated governed in such a case. It is conceded that, had the will been presented to the courts of Connecticut in the first instance and

rights been asserted under it, the operative force of its provisions upon real estate in Connecticut would have been within the control of such courts. But it is said a different rule must be applied where the will has been presented to a South Carolina court and a construction has been there given to it; for, in such a case, not the will but the decree of the South Carolina court, construing the will, is the measure of the rights of the parties, as to real estate in Connecticut. The proposition, when truly comprehended, amounts but to the contention that the laws of the respective States controlling the transmission of real property by will, or in case of intestacy, are operative only, so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate." (178 U. S. 191.)

Speaking for this Court Mr. Justice White expressly rejected the foregoing argument and stated the ultimate holding of this Court as follows:

"From these conclusions it follows that because the court of Connecticut applied the law of that State in determining the devolution of title to real estate there situated, thereby no violation of the constitutional requirement that full faith and credit must be given in one State to the judgments and decrees of the courts of another State, was brought about, as the decree of the South Carolina court, in the particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a want of jurisdiction in the court of South Carolina over the particular subject-matter which was sought to be concluded in Connecticut by such decree. (Citing authorities.)" (178 U. S. 195.)

Contrary to petitioners' suggestion it is the holding expressed above for which the *Clarke* case has been cited and followed by this Court, by the lower federal courts and by various state courts on occasions so numerous that the mere enumeration of the cases would unduly prolong the length of this argument. As the quotation from Beale, *Conflict of Laws*, set forth at page 17 of the petition indicates, it is this proposition for which the *Clarke* case has been accepted by the recognized secondary authorities. According to these authorities the case established a conflict of laws principle so basic and so long recognized as controlling that it has ceased to be regarded as open to challenge.

Respondents submit that from the *Clarke* case and those cases cited therein, such as *DeVaughn v. Hutchinson*, 165 U. S. 566, there have evolved the basic and now axiomatic propositions stated as follows in American Law Institute, *Restatement of the Law, Conflict of Laws:*

"Sec. 208. Whether an interest in a tangible thing is classified as real or personal property is determined by the law of the state where the thing is.

"Sec. 209. Whether interests in land are equitably converted into personal property by dealings with the land depends upon the law of the state where the land is.

"* * *

"Sec. 249. The validity and effect of a will of an interest in land are determined by the law of the state where the land is."

Respondents say that petitioners are plainly wrong in their contention that the Supreme Court of

Texas "misconstrued" *Clarke v. Clarke, supra,* in citing that case for the proposition that if the Ohio courts, relying upon the theory of equitable conversion, had determined the issue of whether Hickok's will is valid or invalid insofar as it gives respondents interests in the Texas real property or in the proceeds thereof, the courts of the situs of the realty (Texas courts) would not have been required to recognize the judgment. (Petition, p. 15.) As already shown, the Ohio courts made no such determination; on the contrary the trial court, affirmed by both reviewing courts, expressly declared that the Texas courts alone had jurisdiction to make such determination. However, the Supreme Court of Texas was entirely accurate in stating that under this Court's holding in *Clarke v. Clarke* the courts of the testator's domicile (there South Carolina, here Ohio) were without jurisdiction to apply the fiction of equitable conversion to foreign realty (there Connecticut realty, here Texas realty) in order to treat that realty as personalty for the purpose of adjudicating matters pertaining to the title thereto. This rule as to jurisdiction is no longer debatable and the constitutional question allegedly arising under the full faith and credit clause is plainly without substance.

Respondents submit that the Supreme Court of Texas was entirely correct in refusing to apply the fiction of equitable conversion to the Texas real property. The authorities cited by that Court and its reasoned opinion plainly so show. But whether or not the opinion of the Supreme Court of Texas is sound or unsound is entirely beside the point. It was that court *and that court alone* that had jurisdiction

to determine the issue and having determined it, the correctness of such decision is not subject to review here.

Petitioners' contention that there is a "conflict" between the accepted interpretation of *Clarke v. Clarke*, on the one hand, and *Dull v. Blackman*, 169 U. S. 243, and *Fall v. Eastin*, 215 U. S. 1, on the other hand, and that this Court should establish the line of demarcation between the cases is likewise without substance. No such "conflict" exists; there is no line to be established.

In 1898, two years before this Court's decision in the *Clarke* case, this Court decided *Dull v. Blackman*, in which it was called upon to determine the effect of a New York decree in an action *in personam* upon the title to realty situated in Iowa. The precise question involved was whether parties not served with process in the New York action could be bound by the *in personam* judgment. This Court held that the New York decree could not and did not operate upon the land or affect the title to the land; that at most the New York courts could have coerced the execution of a conveyance by a party before the court through an order *in personam*, thereby indirectly affecting title to the realty.

That this Court's holding in *Dull v. Blackman* is in complete harmony with its decision in *Clarke v. Clarke* is apparent from the recognition by this Court in the *Clarke* case of this very proposition. In this connection the Court said:

"If, however, by the law as enforced in Connecticut, land in Connecticut owned by Mrs. Clarke at her decease was real estate for all purposes, despite the

provisions contained in her will, that land was a subject-matter not directly amenable to the jurisdiction of the courts of another state, however much those courts might indirectly affect and operate upon it in controversies, where the court, by reason of its jurisdiction over persons and the nature of the controversy, might coerce the execution of a conveyance of or other instrument encumbering such land." (178 U. S. 193.)

In *Fall v. Eastin, supra,* decided in 1909, it was decided that, although a decree *in personam* directing a party before the court to convey real property in another state would be effective if the party complied with the order, *i.e.,* the conveyance would then affect the title to the realty; that if the party did not comply with the order, the court would have no jurisdiction to act directly upon the title either by setting off to the proposed grantee the realty itself or by appointing a commissioner to convey title. This Court further held that the courts of the situs of the realty were not required to give full faith and credit to a judgment or decree purporting to thus directly act upon the title to foreign real property. In this connection the Court quotes from and follows *Watkins v. Holman,* 16 Pet. 25, wherein it was said:

"And no principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the land is situated." (16 Pet. 57.)

That there is no conflict between the *Clarke* case and *Fall v. Eastin* is shown by this Court's opinion in *Olmsted v. Olmsted,* 216 U. S. 386, wherein it

is stated that the principle laid down in the *Chirac* case was recognized in *Pratt v. Easton*. ([illegible] U. S. 393.)

There is not a line in the judgments or in the opinions of the Ohio courts indicating any intent to act *in personam* by requiring respondents to execute any kind of instrument with respect to the Texas realty. Nowhere in their petition do petitioners assert that the Ohio courts so acted or intended to so act. Consequently nothing would be gained by speculating as to what *in personam* jurisdiction the Ohio courts might have. As already shown, those courts did not purport to act in any way upon the Texas realty; but the point we make here is that, if they did so act, their action was in *rem*.

Respondents submit that *Chirac v. Chirac* stands —as it has stood for more than fifty years—as the undisputed and unmodified precedent for a principle of law no longer open to debate, a principle which the Supreme Court of Texas scrupulously followed and which the Ohio courts properly recognized by expressly refusing to attempt to adjudicate whether Hickok's will is valid or invalid insofar as it gives respondents interests in Texas real property or in the proceeds thereof. The basic holding in that case, a holding now recognized as axiomatic, may not be relegated to the realm of dictum. This is exactly what petitioners have attempted to do by removing *obiter dicta* in the *Chirac* case from its context and by suggesting for that *dicta* a meaning that removes from the ambit of the decision this Court's basic holding with respect to the jurisdiction of a court over foreign realty.

The petition for a writ of certiorari should be denied because the Ohio courts made no attempt to adjudicate the issue of whether Illinois will is valid or invalid insofar as it gives respondents interests in Texas real property or its proceeds; and because such an adjudication by the Ohio courts, even if made, would have represented an ineffectual attempt to usurp the exclusive jurisdiction of Texas courts over Texas real property.

Prayer

Respondents pray that the Petition for Writ of Certiorari to the Supreme Court of Texas be in all things denied.

Respectfully submitted,

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FILED
MAR 31 195
HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 590.

CLARENCE H. HICKOK, RUTH HICKOK MARVIN, E. W. MARVIN and DAISY S. HICKOK,

Petitioners,

vs.

TOLEDO SOCIETY FOR CRIPPLED CHILDREN, Toledo, Ohio; RIVERSIDE HOSPITAL, Toledo, Ohio; MERCY HOSPITAL, Toledo, Ohio; *et al.*,

Respondents.

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Respondents.

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

The "Respondents' Brief Opposing Petition" contends, first, that "there is no Ohio judgment that has been or that could be denied full faith and credit by the Supreme Court of Texas" (Respondents' Brief, p. 11) and, second, that "if the Ohio courts had entered a judgment purportedly controlling the devolution of the Texas real property, such judgment would have been void for want of jurisdiction" (Respondents' Brief, p. 13).

I.

The respondents cannot and do not deny that there is an express judgment of an Ohio court that the respondents

> "have and shall have no right or interest in the assets of the trust created by the will of Arthur S. Hickok

> or any right at any time to share in any distribution thereof"

(R. 47) and that the respondents are

> "forever barred from asserting any right, title or interest in or to the assets of said estate and of said trust or in or to any distribution thereof"

(R. 47).

The Ohio judgment does not mention specifically 3,912 shares of capital stock of Hickok & Reynolds, Inc. as such. Except for the Court's finding as to 250 shares of Hickok & Reynolds, Inc., the Ohio judgment does not mention specifically any other asset which the respondents were barred from claiming. The decree covers all assets of the estate and trust of A. S. Hickok.

The entire record of the Ohio proceedings is not a part of the record here and cannot be cited to show the Ohio court's reason for the specific finding as to the 250 shares. If the same is material, this Court should infer from the Ohio court's judgment (what is in fact true) that there was a separate and distinct issue raised with reference to the 250 shares, which issue is not before this Court, and should ignore the false inference which respondents seek to foist upon the Court because of the Ohio court's failure to mention specifically the 3,912 shares.

The respondents call attention (Respondents' Brief, pp. 8, 9) to the statement in the opinion of the Probate Court of Lucas County that,

> "The opinion of this court as to equitable conversion, however, cannot be a controlling judgment. The courts of Texas will determine the effect of the will as it relates to real estate located in that state."

(R. 151) Respondents neglect to quote those passages of the court's opinion in which the court makes it clear that

its judgment covers all the proceeds of Texas real estate which, as personal property, might come into the hands of the executors or trustees. Immediately before the portion of the opinion quoted by the respondents, the court points out that:

> "Thus this property has been actually converted, and is now represented by the shares in the corporation."

(R. 151) Almost immediately *after* the portions quoted by the respondents, the court further points out that:

> "It appears that the subject of equitable conversion need not be particularly stressed for the reason that all the properties of the testator have been or will be converted into personalty pursuant to the terms of the will."

(R. 152) This emphasis by the court on *actual* conversion of Texas real estate into personal property, and the effect of its judgment on all such personal property disposes of respondents' argument as to the intent of the Ohio decree.

II.

The respondents contend that

> "if the Ohio courts had entered a judgment purportedly controlling the devolution of the Texas real property, such judgment would have been void for want of jurisdiction and would not have been entitled to full faith and credit"

(Respondents' Brief, p. 13). This contention ignores the fact that, what the Ohio courts did, and what they had jurisdiction to do, was to direct trustees appointed by an Ohio court as to the distribution to be made of shares of an Ohio corporation. Whatever the consideration given by

Ohio executors for the shares of Hickok & Reynolds, I
(and respondents to the contrary notwithstanding, th
Brief, p. 7, these shares have been and are held by O
fiduciaries), such shares were nonetheless personal prope
and subject to the jurisdiction of the courts of Ohio.

With reference to *Clarke* v. *Clarke*, 178 U. S. 187, t
petitioners call attention to the fact that the responden
brief, like the opinion of the Supreme Court of Texas, c
fuses the question of the exclusive applicability of Te
law with the question of the exclusive jurisdiction of Te
courts.

Petitioners concede that

> "the validity and effect of a will of an interest
> land are determined by the law of the state where
> land is."

(Section 249 of *Restatement of the Law, Conflict of Law*
but it does not follow that, since the law of Texas contr
an Ohio court cannot apply that law. Ohio courts are r
as the respondents and the Supreme Court of Texas se
to contend, deprived of jurisdiction over persons
subject matter both within their power and control beca
questions of Texas law are involved. The courts of O
have jurisdiction to apply the law of Texas to parties pr
erly before them and the courts of Texas are not at liberty
ignore their judgments even though the Ohio courts h
incorrectly decided what is the Texas law. *Fauntleroy*
Lum, 210 U. S. 230, 236-237; *Roche* v. *McDonald*, 275 U
449, 454-455.)

Respectfully submitted,

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